# LAW REPORTS OF TRIALS OF WAR CRIMINALS

*Selected and prepared by*

THE UNITED NATIONS
WAR CRIMES COMMISSION



VOLUME V



*LONDON*
PUBLISHED FOR
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# FOREWORD

This volume is the last volume to be published of those which were substantially completed before the commencement of the winding-up of the Commission. The three British cases reported here were submitted to and approved by the Legal Publications Committee, but as to the remainder, it was not possible to submit them to that Committee before the 31st March, 1948, which was the date of the commencement of the winding-up. Of those who had been members of the Legal Publications Committee, Mr. Kintner (United States), the Chairman, was recalled to the United States by the State Department, and Dr. Schram-Nielsen (Denmark) went back to Denmark. The remaining member of the Legal Publications Committee was Mr. Aars Rynning (Norway), and I am happy to state that the Norwegian Government have been kind enough to give to the Commission the benefit of his valuable services and he will accordingly continue to take part in the preparation of the Law Reports.

The work of preparation will be carried out by a new staff which, however, includes most of the members of the legal staff who were working for the Commission. The staff which will be concerned in the publication of this series and which will act under my general supervision (though the individual responsibility will attach to each member of the staff personally for his own work) will be in addition to Mr. Aars-Rynning, Mr. George Brand, LL.B. who will act as Editor-in-Chief, and, as his collaborators, Mr. Jerzy Litawski, LL.M. and LL.D. (Cracow) and Mr. Radomir Zivkovic, LL.D. (Belgrade) and also a newcomer, Mr. Stephen M. Stewart, an English Barrister of the Inner Temple. It has, however, not been thought that it will be necessary to identify any particular Report with the name of any particular member of the staff. It is hoped to complete and publish all the Reports which we are able to do by or soon after the end of this year (1948).

The arrangement which was made by the Commission before it went out of existence was that a particular sum of money should be vested in Trustees in order to furnish funds for the production and publication of these Reports. It was hoped that the sum so set aside, though not exorbitant, would be sufficient for the completion of ten volumes beyond the first five, which include the present volume. Accordingly the funds available will not be used for these five volumes but will be used for the subsequent ten volumes. If it should turn out that unfortunately there has been an underestimate of the expenditure necessary for the publication of these ten volumes, the number of volumes published will have to be curtailed proportionately because there are no other monies which can be called upon for this publica-

tion. It is, however, hoped that it will be possible to complete at least the ten volumes.

The cases reported in this volume have a common feature in that they all deal with that type of war crime which can be rather roughly and summarily described as "the denial of a fair trial." The fundamental principle involved is that the customary law of war requires that before anyone, a combatant or non-combatant, should be executed or otherwise punished as for an offence against the laws of war, he should first be tried and sentenced by a court whose jurisdiction is recognized by international law. The Anglo-American lawyer will naturally think as an example of this traditional rule of the famous case of Major André in 1780—though the unfortunate English officer was caught *in flagrante delicto* acting as a spy against the Americans, he was not executed until he had been tried with the most scrupulous legality by an American Court of Generals convened by General Washington, and the sentence had been approved by General Washington as the American commander-in-chief. I may refer to the full account given in Volume V of *The American Revolution* by Sir G. O. Trevelyan. In the cases contained here there are some in which there was no trial at all. In other cases there was no trial which, if it could be called a trial at all, would be called a fair trial. These principles have already been adverted to and illustrated in previous volumes of this series. I may refer to the case of Oscar Hans, a Norwegian executioner who had officiated in that capacity in the execution of more than 300 victims while the country was occupied by the Germans. He was eventually apprehended by the Norwegian Government after the occupation had come to an end, and tried by the Norwegian courts. He was first convicted by a majority in the Lagmannsrett, but the Supreme Court overruled and quashed the conviction, holding that the prisoner could not be affected with notice that the trial of the different Norwegians who were executed had been unfair or insufficient, or that the victims had been denied a fair trial. It was therefore unnecessary to decide whether the victims who were executed had or had not been tried and executed according to law because, as the presiding Judge in the Supreme Court pointed out, it was not sufficient for a conviction for wilful murder that the accused ought to have known the circumstances which made his act illegal. In other words, actual knowledge of the inadequacy or unfairness of the trial was held to be necessary in that case, in which the Norwegian Court took its law from the specific provision on the point in the Norwegian Code. However, in some cases reported in this volume certain of the accused were convicted of being responsible for causing the death of particular victims in violation of the laws and customs of war, and therefore guilty of a war crime because they could not justify the killing under the laws and customs of war. I will not attempt here to summarize the effect of these cases because that has been done by Mr. Brand on pp. 70—81 of this

volume, under the heading "The Criminal Aspects of the Denial of a Fair Trial." A general discussion of the whole subject must be reserved until further cases have been reported. I may merely point out that a great deal will depend on the capacity in which the accused war criminal acted. He might, for instance, have been one of the judges or he might have been a responsible prosecutor. These are perhaps the two most important functions which may lead to a man being charged and tried as a war criminal because of his conduct in the exercise of these functions, and because by reason of that conduct a combatant or non-combatant has been sentenced to death and executed. Volume VI, the next succeeding volume of this series, will, it is contemplated, include a report upon the elaborate Judgment given in the trial of Josef Altstötter, and fifteen others by a United States Military Tribunal at Nuremberg between 3rd March and 4th December, 1947. That decision took the law beyond the cases dealt with in this volume because these were limited to what are called war crimes *stricto sensu* and the charges did not include the further category of crimes against humanity which were within the jurisdiction of the United States Court which sat at Nuremberg, as will appear in the later volume.

The cases reported here, like the other cases reported in this series, have as their purpose the illustration of the general principles of that part of international law which deals with the law and custom of war as it has been developed on the basis of the rules previously recognized or adumbrated. This represents the normal course of procedure in the evolution of the Anglo-American common law and similar types which depend on the application and extension of general rules to particular cases. This is characteristic not only of the Anglo-American common law but also of the rules of international law, for instance the rules of prize law which are constantly being expanded to meet novel situations and problems, or to take one single instance, in the doctrine of continuous voyage in the law of Prize. In no other connection has this been so well exemplified as by the war crimes which have called for investigation and punishment in the war which has just ended. Whatever novelty there has been in conditions and facts has called for a corresponding novelty in the rules, though always with strict regard to the general principles previously laid down in the recognized sources of the law. These volumes will also be useful by way of historical record of the types of the crimes and atrocities which were committed in the war.

WRIGHT,

*Chairman,*

United Nations War Crimes Commission.

London, *June*, 1948.

## CASE No. 25.

# TRIAL OF LIEUTENANT-GENERAL SHIGERU SAWADA AND THREE OTHERS

UNITED STATES MILITARY COMMISSION, SHANGHAI,

27TH FEBRUARY, 1946—15TH APRIL, 1946

## A. OUTLINE OF THE PROCEEDINGS

### 1. THE CHARGES

The charge against Major-General Shigeru Sawada, formerly Commanding General of the Japanese Imperial 13th Expeditionary Army in China, was that, on or about August, 1942, he did " at or near Shanghai, China, knowingly, unlawfully and wilfully and by his official acts cause" eight named members of the United States forces "to be denied the status of Prisoners of War and to be tried and sentenced by a Japanese Military Tribunal in violation of the laws and customs of war."

It was also charged that the second and third accused, Second-Lieutenant Okada Ryuhei and Lieutenant Wako Yusei, both of the Japanese Imperial 13th Expeditionary Army in China, as members of a Japanese Military Tribunal, "did at Kiangwan Military Prison, Shanghai, China, knowingly, unlawfully and wilfully try, prosecute and adjudge " the eight members of the United States forces "to be put to death in violation of the laws and customs of war."

Finally, a charge was brought against Tatsuta Sotojiro, Captain in the Japanese Imperial 13th Expeditionary Army in China, stating that he " did at Shanghai, China, knowingly, unlawfully and wilfully command and execute an unlawful Order of a Japanese Military Tribunal, and did thereby cause the death of ' three of the victims ' who were lawfully and rightfully Prisoners of War " and in his capacity as " Commanding Officer of the Kiangwan Military Prison, Shanghai, China " did between 28th August, 1942 and 17th April, 1943, at Kiangwan Military Prison, " deny the status of Prisoners of War to " all eight, in violation of the laws and customs of war.

The accused pleaded not guilty.

In greater detail the allegations made by the Prosecution concerned the following acts of commission and omission :

(i) That Sawada, as commanding general of the 13th Japanese Army in China, caused the eight captured American fliers to be tried and sentenced to death by a Japanese military tribunal on false and fraudulent charges ; that he had the power to commute, remit and revoke such sentences and failed to do so, thereby causing the unlawful death of four of the fliers and the imprisonment of the others ; that

he was responsible for the improper treatment of all the captured airmen, having denied them the lawful status of prisoners of war ; that in addition, he was responsible for the cruel and brutal atrocities and other offences, including the denial of proper food, clothing, medical care and shelter, committed against one of the eight.

(ii) That the two accused Okada and Wako unlawfully tried and adjudged the eight fliers under false and fraudulent charges without affording them a fair trial, interpretation of the proceedings, counsel, or an opportunity to defend, and sentenced them to death.

(iii) That Tatsuta commanded and executed an unlawful order of a Japanese military tribunal which caused the death of three of the fliers, and that as commanding officer of Kiangwan Military Prison he forcibly detained all eight in solitary confinement and otherwise unlawfully treated them by denying them adequate and proper shelter, bedding, food, water, sanitary facilities, clothing, medical care and other essential facilities.

## 2. THE EVIDENCE

Eight United States airmen, after taking part in a bombing raid on a Japanese steel mill, an oil refinery and an aircraft factory on 18th April, 1942, were forced to earth and captured by the Japanese and eventually held in Tokyo for about fifty-two days, during which time they were imprisoned in solitary confinement. There was evidence that, both during their period in Tokyo and previously, they were subjected to various forms of torture during interrogations.[1]

On 28th August, 1942, after spending approximately seventy further days at the Bridge House Jail, Shanghai, in small verminous and insanitary cells, all eight fliers were removed to the Kiangwan Military Prison, on the outskirts of Shanghai. At the time of their transfer, all the fliers were weak and underweight and one was very ill. On arriving, they were assembled in a room before several Japanese officers, who, they later learned, constituted their court-martial.. The accused Wako and Okado were among the members of the court. The accused Tatsuta attended the trial voluntarily and not officially, as a spectator, for a short time. The fliers stood before the Japanese officers who conversed in their own language. The sick prisoner was carried in on a stretcher where he continued to lie during the proceedings. He was ill but was not attended by a doctor or a nurse. He did not, by his eyes or facial expression, appear to recognize the others ; nor did he make any statements. The fliers were asked a few questions about their life histories, their schooling and training. After they answered, one of the Japanese stood up and read from a manuscript in Japanese. The fliers made no other statement. There was an interpreter present, but he did not interpret anything except the fliers' names and ranks, and similar details. The proceedings lasted about two hours at the very most. The fliers were not told that they were being tried ; they were not advised of any charges against them ; they were not given any opportunity to plead,

[1] The accused were not charged with responsibility for this ill-treatment however.

either guilty or not guilty ; they were not asked (nor did they say anything) about their bombing mission. No witnesses appeared at the proceedings ; the fliers themselves did not see any of the statements utilized by the court that they had previously made at Tokyo ; they were not represented by counsel ; no reporter was present ; and to their knowledge no evidence was presented against them.

Prior to the trial, a draft of a Japanese law concerning the punishment of captured enemy airmen was sent from higher headquarters at Tokyo to the Headquarters of the China Expeditionary Forces in Nanking in July, 1942, and at the same time Tokyo requested the 13th Japanese Army Headquarters to defer its trial of the eight American fliers until the new military law had been enacted. Soon afterwards the supreme commander at Nanking (General Hata) issued this " Enemy Airmen's Act " to the 13th Army. This law stated in substance that it should take effect on 13th August, 1942 and be applied to all enemy airmen taking part in raids against Japanese territories ; that any one who should participate in the bombing or strafing of non-military targets or who should participate in any other violation of international law would be sentenced to death, which sentence might be commuted to life imprisonment or to a term of imprisonment not less than ten years ; and that imprisonment under the Act would be in accordance with the provisions of Japanese criminal law. A staff officer from Tokyo was sent to China to give instructions regarding the trial of the fliers and to demand that General Hata have the prosecutor require the death sentence and report the court's decision to Tokyo.

The evidence of the accused Sawada, Okada, and Wako showed that only a permissive death sentence existed under Japanese law prior to the enactment of the Enemy Airmen's Act.

The defence in the United States trial contended that the Japanese court was regularly appointed and consisted of Major Itsuro Hata as prosecutor, Lieutenant-Colonel Toyoma Nakajo, as chief judge, and the two accused, Wako and Okada, as associate judges ; that the proceedings in the trial of the fliers on 28th August, 1942, did not differ from the regular proceedings of other Japanese trials ; that no pleadings were authorized by Japanese law ; and that no defence counsel were authorized. Further contentions by the defence were that the court proceedings lasted at least two hours ; that documentary evidence, consisting of at least the gist of the air raid damage reports from Tokyo and the fliers' alleged confessions made to the Tokyo Gendarmerie admitting attacks on non-military targets, were read to the court. (The accused Wako, however, denied this).

Although these purported confessions were supposed to have had the signatures and thumb prints of the several American fliers on them, there is no evidence that any attempt was made to verify or prove that these were genuine or actually those of the fliers. After a two hour session the court adjourned for lunch, and then deliberated for another hour and unanimously decided on the death sentences for all eight fliers. There was some evidence that a record of the trial proceedings was made at the trial, and either was

filed with the 13th Army or was transferred to Headquarters at Tokyo in December 1944, where it was destroyed in a fire.

After the trial a telegram was sent to Tokyo through Nanking announcing the sentence of the court, and later a written report was sent. Headquarters of the 13th Army had been instructed to withhold any action on the sentences until Tokyo acted on them. Later instructions were received from Tokyo to execute three of the victims, including the prisoner who had been ill throughout the trial. The sentences passed on the other five were commuted to life imprisonment.

The executions were carried out on 15th October, 1942. The five surviving fliers were returned to confinement in the Kiangwan prison.

The accused General Sawada was in command of the 13th Army, with headquarters at Shanghai, at the time when the fliers were captured. He remained in command until he received orders relieving him on 8th October, 1942 or thereabouts. From 7th May, 1942 until 17th September, 1942 Sawada, though still the Commanding General of the 13th Army with his headquarters functioning for him at Shanghai, was absent at the front about three hundred miles away. Nevertheless, though he was not in Shanghai at the time of the trial, the tribunal that sentenced the fliers was appointed under his command authority as Commanding General of the 13th Army. Colonel Ito, Sawada's chief legal officer, did not accompany Sawada to the front but remained behind at Headquarters with Sawada's delegated authority to act for him on all legal matters, and the authority to use General Sawada's name was given him prior to the former's departure for the front.

On General Sawada's return to Shanghai on the 17th September, 1942, after the trial of the fliers which took place in his absence, he was personally informed of all the proceedings involving the fliers that took place during his absence. Colonel Ito informed General Sawada of the proceedings he had directed under his delegated authority before trial, during the trial, and immediately following the trial and told him that a report thereof had been sent on to Tokyo. He also gave Sawada a copy of the record of the trial and the " statement of judgment," and Sawada placed his own mark thereon. Sawada stated that he felt that the death sentences were too severe and went to Nanking and protested to the Commanding General of the China Forces but that he, General Hata, said that nothing could be done about the matter as it was exclusively up to Tokyo to make a decision. Thereafter, General Sawada did not make further attempts to have the sentences changed. The accused General Sawada, prior to his leaving Shanghai on 12th October, 1942, made no attempt to exercise any powers with respect to suspension, remission or mitigation of the sentences given by the court. Sawada stated that he did not have the authority to do so or to disapprove any of the court's proceedings. Sawada testified that he personally was familiar with the rules of the Geneva Convention on the treatment of prisoners of war, and that whatever Colonel Ito did in connection with the American fliers, he, Sawada, assumed responsibility for. Sawada stated in evidence that he had jurisdiction over Kiangwan Prison.

He admitted that although this prison was only three hundred yards from his personal headquarters he never went inside it or concerned himself about its prisoners.

The accused Lieutenant Yusei Wako was an officer in the judicial department of the Japanese Army and was assigned to the judicial department of the 13th Army in Shanghai in May, 1942. His immediate superior was Colonel Ito, the head of the legal department of the 13th Army. Wako, who was a lawyer, was told by Colonel Ito that he (Wako) would be a judge in the trial of the fliers and that the trial was considered to be an important case. Wako testified that Colonel Ito and Major Hata discussed the case with him prior to the trial, that these discussions began about 15th August, 1942, when the 13th Army received the Enemy Airmen's Act from Nanking Headquarters, and, further, that the court received instructions from Colonel Ito that under the Enemy Airmen's Act the death sentence was mandatory if the fliers were found guilty. Wako read all the evidence prior to the trial. He claimed that " since the entire charges were long we told the Americans they would be tried for bombing of Tokyo and Nagoya." He stated also that only a gist of the documentary evidence was read in court, that the fliers denied firing on schools, and that the statements personally given by the fliers in Tokyo were not read in court. At the trial, Wako was not only a judge ; since the judicial section of the 13th Army was required to have one of its members on the court, he acted also in the capacity of its legal adviser.

The accused Captain Okada was an officer with the 13th Japanese Army in Shanghai, China, and in August 1942, he was ordered to sit as one of three judges at the trial of the fliers. About three days prior to the trial when he received his orders to sit as a judge he was given advance notice as to the nature of the proceedings. He had sat as a judge on other courts and was not unfamiliar with trial procedure. On the morning of the trial, 28th August, 1942, he spoke to the accused Wako about the case. Also prior to the trial of the eight fliers he heard about the evidence in the case, namely, the Tokyo Gendarmerie interrogation and damage reports. He " looked through " two reports and Wako explained them to him prior to trial. Major Hata, the prosecutor, also talked to Okada about the case prior to trial. Okada testified that during the trial the sick prisoner appeared weak and lay on a blanket or mattress of some kind throughout the trial. Although he acted as a judge he heard only the gist of the documents comprising the interrogation report from the Gendarmerie in Tokyo. He also stated that "it was not possible to prove which bomber dropped what bomb on what part of the city according to the report," that no witnesses were brought before the court, that no defence counsel was provided for the fliers, that only documentary evidence was presented, that Wako alone asked the fliers questions about the raid, their training, etc., and that half of the trial, or about an hour, was spent in this line of questioning. He also testified that only the gist of the reports were read to the court ; no member of the court asked the fliers to write out their signatures for comparison with the purported signatures on the statements obtained from the fliers in Tokyo ; no real evidence of the Nagoya and Tokyo raids was offered by the prosecution, and the prosecution did not require any witness

to come into court from the Tokyo Gendarmerie to substantiate the documentary evidence from Tokyo. Okada said that he personally based his finding of guilty and the death sentences on the Gendarmerie investigations, the damage report, the reading of the charges and the statements made in court by the fliers.

The accused Tatsuta became warden of the Kiangwan Military Prison in Shanghai on 24th December, 1938, and remained its head until it was closed in March 1944. Captain Ooka at the Nanking Prison was his superior who gave him orders in regard to Kiangwan Prison. Tatsuta confined the fliers after trial on a writ of detention issued by Lieutenant Colonel Toyoma Nakajo, the chief judge of the 13th Army military tribunal and so informed Captain Ooka, his superior.

In his official capacity as warden or chief of the guards Tatsuta was also in charge of the execution of the three fliers and signed the report of execution. The evidence indicated, however, that the order which Tatsuta received to carry out the unlawful sentences was of apparent legality, that is to say, on its face it appeared to be legal to one who neither knew or was bound to inquire whether the order was in fact illegal. Tatsuta visited the courtroom for a short time while the so-called trial was in progress and he observed the sick condition of one of the prisoners. There was no conclusive proof, however, of either actual or constructive knowledge on Tatsuta's part of the illegality of the Enemy Airmen's Act, the trial under it, or the sentences passed at the trial.

Following the executions the other five fliers continued to remain in the prison serving their life sentences until they were transferred to the military prison at Nanking, China on 17th April, 1943. Excepting the sick flyer who was returned to Bridge House Prison, the fliers were kept in solitary confinement from 28th August, 1942 to 5th December, 1942. They were given the same facilities for exercise as other prisoners which was about thirty minutes a day. When they remained in their cells they were not permitted to talk or walk around. No heat was provided in the cells although it was cold enough to freeze water on many nights. They were never given any additional clothing or any change of clothing, except one pair of stockings. The cells were infested with lice and fleas. The only furnishings were grass mats on the floor ; there were no beds, chairs or tables. The only latrine facility was a hole in the floor of each cell with a can in it. Several requests were made to Tatsuta for additional food and clothing that he either refused or ignored. The fliers were never visited by the Red Cross or any representative of a neutral government.

The fliers received about six ounces of rice three times a day and some soup or a few greens. There were no medical facilities at Kiangwan, and when the fliers left the prison for Nanking all of them were in a weak condition. At Nanking a fourth prisoner died of malnutrition, beriberi, dysentery and general lack of care.

### 3. THE VERDICT AND SENTENCES

At the close of the trial of the case the Commission announced to the accused in open court its conclusions as follows :

" *Conclusions.* After deliberation for two days, the Commission in arriving at its findings and sentences, from the evidence presented, draws the following conclusions :

" The offences of each of the accused resulted largely from obedience to the laws and instructions of their Government and their Military Superiors. They exercised no initiative to any marked degree. The preponderance of evidence shows beyond reasonable doubt that other officers, including high governmental and military officials, were responsible for the enactment of the *Ex Post Facto* ' Enemy Airmen's Law ' and the issuance of special instructions as to how these American prisoners were to be treated, tried, sentenced and punished.

" The circumstances set forth above do not entirely absolve the accused from guilt. However, they do compel unusually strong mitigating consideration, applicable to each accused in various degrees.

" As for Shigeru Sawada : Although he was Commanding General of the 13th Japanese Army, he was absent at the front and had no knowledge of the trial and special instructions issued by his superiors until his return to Shanghai three weeks after the results of the trial had been sent to the Imperial Headquarters in Tokyo over his ' Chop.' Although he did not make strong written protests to Imperial Headquarters in Tokyo, he did make oral protest to his immediate superior, the Commanding General of the Japanese Imperial Expeditionary Forces in China to the effect that in his opinion the sentences were too severe. Although he was negligent in not personally investigating the treatment being given the American prisoners, he was informed by his responsible staff that they were being given the treatment accorded Japanese officer prisoners.

" As for Yusei Wako : He, as Judge and law member of the Military Tribunal, had before him purported confessions of the American fliers and other evidence obtained and furnished by the Military Police Headquarters in Tokyo. Although he held this position and was legally trained, he accepted the evidence without question and tried and adjudged the prisoners on this evidence which was false and fraudulent. However, in voting the death penalty he was obeying special instructions from his superiors.

" As for Ryuhei Okada : Although he sat as a Judge at the trial and enjoyed freedom of conscience in determining as to the guilt or innocence of the prisoners, he adjudged them guilty. This officer however had no legal training and did register a protest to being a judge on any court. In voting the death penalty, as in Wako's case, he was obeying special instructions from his superiors.

" As for Sotojiro Tatsuta : Although he did act as executioner at the execution and was directly in charge of these prisoners at the Kiangwan Military Prison, he did this in his official capacity as warden. Although he did not accord them the treatment provided for Prisoners of War, he was obeying special instructions from his superiors, and there is no evidence to show that he personally mistreated these prisoners or treated them in a manner other than that which was provided for in this instructions."

Shigeru Sawada was found guilty of the charge with the exception of the words " knowingly " and " and wilfully ", but in pronouncing upon the individual specifications, the Commission found the accused General Sawada not guilty of having the power and failing to use it to commute, remit and revoke the sentences given the fliers. He was sentenced to be confined at hard labour for five years.

Yusei Wako and Ryuhei Okada were found guilty and were sentenced to hard labour for nine and five years respectively.

Sotojiro Tatsuta was found guilty of the charge against him, except as regards one of the victims and excepting the words " command and " and " commanding officer ", substituting for the latter words " Warden ". He was sentenced to hard labour for five years.

The findings and sentences were approved by the Reviewing Authority, with the exception of the finding that Tatsuta had acted unlawfully in being in charge of the execution of three prisoners.

## B. NOTES ON THE CASE

### 1. A PLEA TO THE JURISDICTION OF THE COURT

Before the hearing of the evidence, the defence entered motions to dismiss the charges against the four accused for lack of jurisdiction by the Commission alleging :

(i) that the Commanding General who appointed the Commission was without the legal authority to do so as he received his purported authority from the Joint Chiefs of Staff, who in turn had no jurisdiction to appoint military commissions in China,(1)

(ii) that China had jurisdiction superior to the appointing authority and had not waived it by any governmental act, and

(iii) that the mere administrative acts of local Chinese agencies could not grant the Republic of China's consent to a foreign power to set up " territorial courts " in China.

In replying to the arguments of the Defence, the Prosecutor pointed out that the Supreme Court of the United States, in its judgment in the *Yamashita Trial* (2) had said :

> " General Styer's order for the appointment of the Commission was made by him as Commander of the United States Armed Forces, Western Pacific. His command includes, as part of a vastly greater area, the Philippine Islands, where the alleged offences were committed . . . "

(1) Acting pursuant to the authorization of the Joint Chiefs of Staff, given on 18th January, 1946, General Wedemeyer, Commanding General U.S. Armed Forces, China Theatre, set up the Commission on 16th February, 1946, and instructed it to follow the China Regulations which have been described in Vol. III of this series, pp. 105-113. The same Regulations governed the proceedings of the Commissions which tried the other two United States cases reported in the present volume (see pp. 68-81).

(2) See Vol. IV of this series, p. 1.

The Prosecutor claimed that this dictum was " directly in point with General Wedemeyer's authority to appoint a Commission regardless of any authority he may have received or sanction of the permission from the Joint Chiefs of Staff. General Wedemeyer exercises general court martial jurisdiction. He is Commander of the United States Armed Forces in China. The offences alleged were committed in China. The prisoners are in China under the control of the U.S. Army, therefore I think the motion is not well taken as to the authority of the Theatre Commander."

As to the legal relationship between the Chinese and the United States Governments in this instance, the Prosecutor said that : " extra-territoriality as far as civil courts and criminal courts and federal courts, by agreement between our government and China are out, but as far as a military commission we are here in China by consent of the Chinese government and I submit that the only authority to challenge this Commission is the Chinese government and not the accused in this case. These accused are in China ; the court is constituted in China ; we have received no objection from the Chinese Government, therefore I request the President of the Commission to deny the motion."

The motions were overruled by the Commission.

The power of the United States Commanding General to appoint the Commission cannot be doubted ; the powers of such a general to set up war crime courts has already been thoroughly discussed in the pages of these Volumes.(1) Nor can it be claimed that the place where the war crime was committed could affect in any way the jurisdiction of the Commission. The laws of war permit a belligerent commander to punish by means of his military courts any hostile offender against the laws and customs of war who may fall into his hands wherever the place the crime was committed.(2)

The setting up of a United States Commission on Chinese soil, however, presents an interesting legal situation. The Commission did not give its reasons for rejecting the Defence motions, but it should be noted that the trials held before United States Military Commissions within the territorial jurisdiction of China were in fact undertaken pursuant to an understanding between the respective military authorities and that this understanding was confirmed by the proper agencies of the National Government of the Republic of China. Furthermore the action of the Commission could be justified on the grounds that the punishment of war criminals was an activity properly incidental to the military operations carried on by the United States forces on Chinese soil with the consent of the Chinese Government. The offences involved were committed in enemy-held territory

(1) See especially the judgment of the Supreme Court of the United States in the Yamashita Trial in Vol. IV, pp. 38-49.

(2) In the trial of Tanaka Hisaksu and others (see p. 66 of this volume), the Commission overruled a plea to the jurisdiction of the Commission based on the fact that the offence took place in Hong Kong, a British Crown Colony. And compare Vol. 1 of this series, p. 42.

of China during active hostilities and the appointing authority was the supreme commander of the United States military forces in China. Although at the time of the trial active hostilities had ceased, the residual military objectives of the United States forces had still to be followed up, including the punishment of war criminals. As was stated by the Judgment of the Supreme Court in the Yamashita Trial:

> " The trial and punishment of enemy combatants who have committed violations of the laws of war is . . . a part of the conduct of war operating as a preventative measure against such violations . . . The war power, from which the Commission derives its existence is not limited to victories in the field, but carries with it the inherent power to guard against immediate renewal of the conflict, and to remedy, at least in ways Congress has recognised, the evils which the military operations have produced . . . We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government."

The United States forces had been present in China at the invitation of the Republic of China as an Allied force to aid in the active prosecution of war against the common enemies. Until such time as the invitation of the Chinese Government had been withdrawn or the mission of the United States forces in China was completed and they had departed, the right to carry out residual war measures was still vested in the commander of the United States forces in China.(1)

## 2. DENIAL OF A FAIR TRIAL (2)

The United States Military Commission which tried this case had to decide exactly how far evidence of the denial of a fair trial to prisoners of war may be considered incriminating, and the fact that the trial was among the earliest of the war crime trials which followed the second World War, with few recorded precedents available, only increased the difficulty of their task.

An examination of the decisions arrived at by the Commission on the charges and on the specifications which elaborated the charges reveals the general nature of the acts which the Commission regarded as constituting war crimes, while a study of the relevant evidence shows in greater detail the character of those offences.

The charge of which Shigeru Sawada was found guilty (as amended by the Commission) stated that he caused certain captives (but not " knowingly and wilfully ") to be denied the status of Prisoners of War and to be tried

(1) The *Almelo Trial* provides another example of a trial held by a Military Court of one ally on the territory of another ally. In this instance also, a special agreement had been entered into. See Vol. I of this series, p. 42.

(2) This question is dealt with further in the notes to various other cases in this volume, see pp. 30-1, 34-6, 38, 64-5 and (particularly) 70-81.

and sentenced by a Japanese Military Tribunal in violation of the laws and customs of war. In greater detail, the offences of which he was found guilty were the following:

(i) that he constituted and appointed (but not " knowingly and wilfully") a Japanese Military Tribunal and directed this Tribunal to try certain " United States Army Personnel on false and fraudulent charges " (Specification 1, as amended by the Commission);

(ii) that the Tribunal set up by him tried and sentenced to death certain United States Army Personnel and Prisoners of War, upon false and fraudulent evidence, all under Sawada's authority " in this official capacity as Commanding General of the Japanese Imperial 13th Expeditionary Army in China " (Specification 2);

(iii) that he, between August and October, 1942, " did deny the status of prisoner of war " to one particular prisoner and did authorize him (but not " knowingly and wilfully ") " to be imprisoned as a war criminal, to be denied proper food, clothing, medical care and shelter, and did allow cruel and brutal atrocities and other offences to be committed against " the said victim (Specification 3 as amended by the Commission);

(iv) that he, between August and October, 1942, caused the other seven victims " to be denied the honourable status of Prisoners of War and wrongfully caused them and each of them to be treated as war criminals " (Specification 5 as amended).

Of more particular interest in a study of the denial of a fair trial are the findings of the Commission on the first and second specifications.

Sawada was found not guilty of knowingly and wilfully failing to commute, remit or revoke the sentences of the Japanese Tribunal, while having power to do so, thus causing the unlawful imposition of death and other sentences. The action of the Commission in finding the accused not guilty on this, the fourth specification, cannot, however, be taken necessarily as meaning that inaction in such circumstances would not constitute a war crime had it been proved, since there was evidence that the accused had made some protest against the sentences and had been told that the matter was in the hands of the Tokyo authorities.(1)

Even though Sawada's wrongful acts or omissions may have been the result of his negligence rather than design on his part, this would not necessarily affect the finding of his guilt. In the *Yamashita Trial* it was held that a Commanding General has the affirmative duty to take such measures as are within his powers to protect prisoners of war from violations of the laws of war.(2)

The offence of which Okada and Wako were found guilty was described in the specifications appearing under the charges brought against them:

(1) See p. 4.

(2) See Vol. IV of these Reports, pp. 1 ff.

that each did, as a member of the Japanese Military Tribunal " knowingly, unlawfully and wilfully try, prosecute and, without a fair trial adjudge certain charges against " the prisoners involved " then Prisoners of War, and without affording the above named Prisoners of War a fair hearing or trial and without affording them the right to counsel and the interpretation of the proceedings into English, and without affording them an opportunity to defend themselves, did on or about the above date, sentence the aforesaid Prisoners of War to death."

Tatsuta was found guilty of:

(i) serving as an executioner at the execution of three of the prisoners (Specification 1);

(ii) denying the status of prisoner of war to the eight captives, and causing them " to be treated as War Criminals, by forcibly detaining the above named Prisoners of War in solitary confinement without adequate or proper quarters, or shelter, bedding, food, water, sanitary facilities, clothing, medical care, and other essential facilities and supplies, and by deliberate failure and refusal, without justification, to provide such facilities and supplies." (Specification No. 2).

The first finding regarding Tatsuta was not however confirmed.

It is impossible to draw up with certainty a complete catalogue of the aspects of the trial which were regarded by the Commission as contributing to its criminal character, but the findings of the Commission set out above show that the following facts were regarded by it as incriminating:

(i) the airmen were tried " on false and fraudulent charges " and " upon false and fraudulent evidence." Even had a war crime been shown to have been committed, the evidence before the Japanese Tribunal connecting the airmen with any such crime was slender and appears to have consisted mainly if not entirely of confessions alleged to have been made by the airmen while in Tokyo. The evidence before the United States Commission showed, however, that the statements made in Tokyo, whatever their contents, were made under duress,(1) and further that no attempt was made by the Japanese Judges to ascertain whether the documents put in as evidence against the airmen were actually the statements made by them in Tokyo.(2)

(ii) the airmen were not afforded " the right to counsel ";

(iii) the airmen were not given the right to " the interpretation of the proceedings into English ";

(iv) the airmen were not allowed " an opportunity to defend themselves."

Furthermore the following facts of greater or lesser importance which were admitted in evidence may have been taken into account by the Commission in deciding that the victims were not given " a fair hearing or trial ":

(1) See p. 2.

(2) See pp. 5-6

(i) the fliers were not told that they were being tried, or told of any charges against them ;

(ii) the airmen were not shown the documents which were used as evidence against them.

The Commission may also have found on the facts that the sick airman was too ill to stand trial, and that the trial proceedings were not of such length as to enable a full investigation of the charges made against the airman.

3. THE PLEA OF SUPERIOR ORDERS

The plea that the accused acted on superior orders was put forward several times by Defence Counsel, and an examination of the Commission's conclusions (1) indicates that the latter placed a certain degree of weight on the plea that the accused were obeying the instructions of their military superiors in conducting the trial of the airmen. " Other officers, including high governmental and military officials ", stated the Commission, " were responsible for the enactment of the *Ex Post Facto* ' Enemy Airmen's Law ' and the issuance of special instructions as to how these American prisoners were to be treated, tried, sentenced and punished." (2)

The Commission continued : " The circumstances set forth above do not entirely absolve the accused from guilt. However, they do compel unusually strong mitigating considerations, applicable to each accused in various degrees." The Commission then proceeded to apply this general statement to the facts relating to each accused.

The sentences meted out to the accused were relatively light, and, in view of the Commission's conclusions, it may safely be said that this arose from the feeling of the Commission that the fact that the offences were committed under orders and in pursuance of a Japanese law constituted a mitigating circumstance.(3)

The plea of superior orders has been raised by the Defence in war crime trials more frequently than any other. The most common form of the plea consists in the argument that the accused was ordered to commit the offence by a military superior and that under military discipline orders must be obeyed. A closely related argument is that which claims that had the accused not obeyed he would have been shot or otherwise punished ; it is sometimes also maintained in court that reprisals would have been taken against his family. A variation is to be found in the argument of

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(1) See p. 7.

(2) In so far as this statement makes reference to the " Enemy Airmen's Law," see pp. 22-4.

(3) It may be noted that the Japanese Commanding General who ordered the trial of the American airmen and his successor in command who ordered the execution of the American airmen were not defendants in this case. They were being held in Tokyo in connection with the proceedings before the International Military Tribunal and their release, or transfer, to Shanghai, for trial as defendants in this case was refused.

Counsel for Dr. Klein, one of the accused in the *Belsen Trial* ;(1) Counsel claimed that if a British soldier refused to obey an order he would face a court-martial, where he would be able to contest the lawfulness of the order, whereas Dr. Klein has no such protection.

Not unnaturally, then, the plea has received treatment or reference on many previous occasions in the pages of these volumes.(2) In view of such difference of opinion as may once have existed as to the validity of the plea of superior orders, it may be of interest and value at this point to summarise without comment the material relating to the plea which has been culled from the records of war crime trials in recent years, and from the relevant international and municipal law enactments and other texts on which reliance has been placed during war crime trials. This is of two kinds :

(i) *Material setting out the circumstances in which the plea may be or has been successfully put forward*

Quotations from the various authorities which make the illegality, the obvious legality or knowledge or presumed knowledge of the illegality, of the order given in some way the criterion falls into this category, as for instance the revised paragraph 433 of Chapter XIV of the British *Manual of Military Law* :(3)

> " The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime ; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, *not obviously unlawful*, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however is governed by the major principle that members of the armed forces are bound to obey *lawful orders only* and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity." (Italics inserted.)

This passage from the Manual has frequently been relied upon as expressing the true state of international law as to superior orders. It was for instance accepted by the Judge Advocate in the *Peleus Trial*.(4)

A second authority on which great reliance has been placed by counsel and which has been quoted as stating correct law by Judge Advocates

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(1) See Vol. II, p. 79.

(2) See Vol. I, pp. 4, 8, 9, 10, 11, 12, 16-20, 27-29, 31-34, 37, 40, 41, 44, 54, 60, 62, 63, 64, 74, 75-76 and 120 ; Vol. II, pp. 38, 75-76, 79, 95-96, 103-4, 107, 108, 117-118, 122, 148 and 152 ; and Vol. III, pp. 6, 18, 19, 22, 38, 42, 47, 54, 58, 64 and 77.

(3) See Vol. I, p. 19 ; and see Vol. II, pp. 77-78 and 108.

(4) See Vol. I, p. 19.

in British Trials (1) has been the celebrated work, *International Law* (Oppenheim-Lauterpacht), of which Volume II (6th Edition) contains on pp. 453–5 a passage which is identical with the amended version of paragraph 443.

Also under this heading falls the quotation from Sheldon Glueck, *War Criminals, the Prosecution and Punishment* which appeared originally in Volume III of these Reports.(2) Glueck, seeking to reconcile the dilemma in which a subordinate is placed by an order manifestly unlawful, compliance with which may later subject him to trial for a war crime, and refusal to comply with which may immediately subject him to disciplinary action, perhaps death, suggests that the following rule be applied: " An unlawful act of a soldier or officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he *actually knew, or, considering the circumstances he had reasonable grounds for knowing that the act ordered is unlawful* under (a) the laws and customs of warfare, or (b) the principles of criminal law generally prevailing in civilized nations, or (c) the law of his own country. In applying this rule, whenever the three legal systems clash, the last shall be subordinate." (Italics inserted).

Again, one of the two Judge Advocates in the *Masuda Trial*,(3) in presenting the case for the Prosecution, quoted, *inter alia*, one court decision which falls within this category in his attempt to secure the rejection by the Commission of the plea of superior orders. The Judge Advocate General, he said, had made reference, in Court-Martial Orders 212–1919, to the following dictum in *U.S.* v. *Carr* (25 Fed. Cases 307): " Soldier is bound to obey *only the lawful orders* of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor by his oath to do it. So far from such an order being a justification it makes the party giving the order an accomplice in the crime."(4) (Italics inserted.)

In his summing up, the Judge Advocate who acted in the trial of Robert Holzer and two others before a Canadian Military Court at Aurich, Germany, 25th March to 6th April, 1946, during which the accused had put forward a plea of superior orders and duress to a charge of being concerned in the illegal killing of a Canadian prisoner of war, advised the Court to follow the passage from Oppenheim-Lauterpacht *International Law* to which reference has already been made.(5) He claimed that the decision of the German Supreme Court in the *Llandovery Castle* case decided at Leipzig in 1921 perpetuated this exact principle by laying down the following: " The defence of superior orders would afford no defence if the act was *manifestly and indisputably contrary to international law* as for instance the killing of unarmed enemies." (Italics inserted.)

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(1) For instance the Judge Advocate in the Belsen Trial advised the court to follow the law laid down in this text on the question of Superior Orders. See Vol. II of this series, pp. 117-118, and p. 43 of the present volume.

(2) See Vol. III, p. 64.

(3) See Vol. I, pp. 71-80.

(4) *Ibid.*, p. 75.

(5) See pp. 14-15.

Regarding the accused Holzer, who had claimed to have acted under superior orders which amounted to coercion or duress, the Judge Advocate said: " The Court may find that Holzer fired the shot at the flyer under severe duress from Schaefer, actually at pistol point, although there is conflicting testimony in this regard. The threats contemplated as offering a defence are those of immediate death or grievous bodily harm from a person actually present but such defence will not avail in crimes of a heinous character or if the person threatened is a party to an association or conspiracy such as the Court might find existed in this case. As to the law applicable upon the question of compulsion by threats, I would advise the Court that there can be no doubt that a man is entitled to preserve his own life and limb, and on this ground he may justify much which would otherwise be punishable. The case of a person setting up as a defence that he was compelled to commit a crime is one of every day. There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified." Lord Hale lays down the stern rule: " If a man be desperately assaulted and in peril of death and cannot otherwise escape, unless to satisfy his assailant's fury, he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he committed the fact; for he ought rather to die himself than kill an innocent man."(1)

The plea of superior orders was put forward in further trials in the present volume, in which the arguments of counsel, as also the advice of the Judge Advocate, again made the validity of the plea turn upon the illegality, the obvious illegality, or the knowledge or presumed knowledge of the illegality of the order given.(2)

Trials in which the plea has had some effect also illustrate the circumstances in which the plea may be successfully put forward. Such trials include that reported upon on pages 1–8 of the present volume and the *Wagner Trial*, which was reported in Volume III of these Reports.(3)

Readers of the latter volume will recall that the French Permanent Military Tribunal of Strasbourg, sitting from 23rd April to 3rd May, 1946, tried ex-Gauleiter Wagner and certain of his underlings for offences committed by them in Alsace during the German occupation. One of the accused, Ludwig Luger, formerly Public Prosecutor at the *Sondergericht* of Strasbourg, was charged with having been an accomplice in murder. The charge was made in the Indictment that, during the trial of a group of 13 Alsatians accused of murdering a frontier guard during an attempted escape to Switzerland, Luger acknowledged that there was no evidence of the guard having been killed by any of the accused yet demanded the death sentence, which was passed on all 13 accused. Nevertheless Luger was acquitted, the Permanent Military Tribunal finding that he had acted under pressure from Wagner, then Gauleiter and Reich Governor of Alsace.

(1) See also p. 21.
(2) See pp. 31, 43, 49-51 and 58.
(3) See Vol. III, pp. 23-55.

(The Indictment alleged that it was Wagner's normal routine to examine an Indictment before a trial was held before the Sondergericht, and to communicate to Luger his orders concerning the penalty which the latter was to demand.)

This French case is interesting also because it represents an instance in which the defence of superior order was pleaded, and successfully, not by a member of the armed forces but by a civilian, a member of the German administration of an occupied territory.

The Supreme Court of Norway provides another example. Hauptsturmführer Wilhelm Artur Konstantin Wagner was charged before the Eidsivating Lagmannsrett (one of the Five Courts of Appeal) with having committed war crimes in that he, in violation of the laws of humanity, was concerned in the deportation and death of 321 Norwegian Jews. The Lagmannsrett found him guilty and sentenced him to death. He appealed to the Supreme court on the ground, *inter alia*, that the punishment decided by the Lagmannsrett was too severe, the majority of the judges having failed to consider that he had acted on superior orders and that in his capacity of a subordinate he could not have prevented the carrying out of the decision of the German and Quisling Governments.

When discussing the severity of the punishment decided upon by the Lagmannsrett, the President of the Court agreed with the minority of that court that it had been established that the defendant held a very unimportant position in the Gestapo and that there was nothing to show that he had taken any initiative in the action. His part had been to pass on the orders from Berlin to the Chief of the State Police and to execute the orders of his superiors. He was sure that if the defendant had refused to obey orders, he would have had to pay for the refusal with his life.

On the other hand, it had been ascertained that the defendant, when superintending the embarkation of the Jews, had personally gone to see to it that more provisions were handed out to them.

He therefore proposed to fix the punishment to 20 years penal servitude. The sentence was approved by a majority of three to two.

Two more examples of trials in which the court considered as a mitigating factor the circumstances that an accused acted under superior orders may be quoted, each relating to trials by United States Military Commissions. On 24th January, 1946, a General Military Government court sitting at Ludwigsburg found two German civilians, Johann Melchior and Walter Hirschelman, guilty of aiding, abetting and participating in the killing of two prisoners of war by shooting them, but sentenced them to life imprisonment; the records make it clear that the death sentence was not inflicted because the accused had acted under the orders of a Kreisleiter. Karl Neuber was found guilty on 26th April, 1946, by a General Military Government court at Ludwigsburg, of aiding, abetting and participating in the killing of prisoners of war by leading them to execution and standing by while they were shot. He had acted on the orders of Criminal Commissar

Weger, in whose office he was a filing clerk. The sentence passed was one of imprisonment for seven years, and an examination of the record shows that the court, in fixing the sentence, bore in mind the fact that Neuber acted under pressure of superior orders.

Finally, readers of Volume I of these Reports will recall that, in the *Masuda Trial* (1) where four Japanese accused were found guilty of the illegal killing of prisoners of war, Defence Counsel provided the Commission which conducted the trial with a typical exposition of the defence of superior orders.(2) It will be remembered that, whereas the actual executioners suffered death, a lesser sentence of imprisonment for ten years was meted out to the accused Tasaki, the custodian of the prisoners of war, who handed over the latter to their executioneers in obedience to the orders of Rear-Admiral Masuda, who had decided on the illegal killing of the prisoners and had actually told Tasaki why he was to deliver up the victims. Tasaki's punishment was lighter than that of the others because of the " brief, passive and mechanical participation of the accused." (3)

During this last trial, four possible criteria for determining the circumstances in which the plea of superior orders might be effective were touched upon by counsel, and it may be of interest to place these on record:

(*a*) The degree of military discipline governing the accused at the time of the commission of the alleged offence. Defending counsel laid great stress on the exceptionally strict obedience to orders which was expected from a Japanese soldier. On the other hand the Judge Advocate expressed the opinion that: " The Japanese Army must observe the same rules that the United States fighting man, the man from Russia and the man from Great Britain must observe. The law is no respector of individual nations. If it is to be an effective law, it must govern the actions of all nations."

(*b*) The relative positions in the military hierarchy of the person who gave and the person who received the order. Counsel for the defence pointed out that the order was given by a Rear-Admiral, to " mere Warrant Officers and Petty Officers."

(*c*) The military situation at the time when the alleged offence was committed. The defence pointed out that discipline at Jaluit was the stricter because of the nearness of the United States forces. This defence is not the same as that based on military necessity, when using which the accused pleads that, irrespective of any superior orders, he acted as he did because the military situation made it necessary for him to do so.

If this argument were to be admitted, it would be for the defence to prove that the situation had actually altered the accused's attitude towards his superiors so as to make him feel that his obligation to obey them had become stricter.

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(1) See Vol. I, pp. 71-80.

(2) *Ibid.*, p. 74.

(3) *Ibid.*, pp. 73, 74 and 76.

(*d*) The degree to which " a man of ordinary sense and understanding " would see that the order given was illegal. This test was suggested by the Judge Advocate,(1) and its use is for Anglo-Saxon lawyers, reminiscent of the frequent references to the hypothetical " average reasonable man," and of a passage of Dicey's in reference to the analogous conflict between a soldier's duty to obey orders and his allegiance to the general law of the land: " . . . a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law " (Professor Dicey, *The Law of the Constitution*, 8th Edition, p. 302, quoted by Professor Lauterpacht in *British Yearbook of International Law*, 1944, p. 72).

The first three of these suggested criteria demonstrate an awareness of the heavy pressure under which an accused may be acting in obeying an order. It is difficult, however, to say precisely how far such criteria as the four set out above are followed by Courts and how far they constitute suggestions *de lege ferenda*. The International Military Tribunal at Nuremberg, commenting in its judgment on Article 8 of its Charter apparently had the same consideration in mind when it said: " The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible." (2)

(ii) *Material defining the legal effect of the plea when successfully put forward*

International agreements and municipal enactments regarding the punishment of war crimes have shown a great reluctance to regard the plea of superior orders as a complete defence, and have preferred to admit that the fact that a war crime was committed under orders may constitute a mitigating circumstance and to leave to the court the power to consider each case on its merits.

Thus, Article 8 of the Charter of the Nuremberg International Military Tribunal provided that:

> " The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

Substantially the same provision is made in Article 6 of the Charter of the International Military Tribunal for the Far East, in paragraph 4 (b) of Article II of Law No. 10 of the Allied Control Council in Germany,(3) and in Regulation 9 of the United States Mediterranean Regulations, Regulation 16 (f) of the Pacific Regulations, September 1945, Regulation 5 (d), (6) of the Pacific Regulations, December 1945, and Regulation 16 (f) of the China Regulations.(4)

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(1) *Ibid.*, p. 75.
(2) British Command Paper, Cmd. 6964, p. 42.
(3) See Vol. III, pp. 101 and 114.
(4) *Ibid.*, p. 105.

Similarly Article 5 of the Norwegian Law of 13th December, 1946, on the Punishment of Foreign War Criminals provides that :

> " Necessity and superior order cannot be pleaded in exculpation of any crime referred to in Article 1 of the present law. The court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted."

Other provisions which leave it to the court to decide what weight to place on the plea are the following :

> " The fact that an accused acted pursuant to the order of a superior or of his government shall not constitute an absolute defence to any charge under these Regulations ; it may, however, be considered either as a defence or in mitigation of punishment if the military court before which the charge is tried determines that justice so requires." (Article 15 of the Canadian War Crimes Act of 31st August, 1946).

> " The fact that the criminal deed was performed by a person acting under orders or in a subordinate capacity does not exempt the criminal from responsibility, but may be taken into consideration as an extenuating circumstance, and in specially extenuating circumstances the punishment may be waived altogether." (Article 4 of the Danish Act on the Punishment of War Crimes of 12th July, 1946).

> " In the case of trials instituted under the provisions of Article 2 of the present law, the fact that the accused acted in accordance with the provisions of enemy laws or regulations, or at the orders of a superior officer cannot be regarded as a reason for justification, within the meaning of Article 70 of the Criminal Code, when the act committed constituted a flagrant violation of the laws and customs of war, or the laws of humanity. The plea may be taken into consideration as an extenuating circumstance." (Article 3 of the Belgium Law of 20th June, 1947, relating to the Competence of Military Tribunals in the matter of War Crimes).

> " Laws decrees or regulations issued by the enemy authorities, orders or permits issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the *Code Pénal*,(1) but can only, in suitable cases, be admitted as extenuating or exculpating circumstances." (Article 3 of the French Ordinance of 28th August, 1944, Concerning the Prosecution of War Criminals).

Article 5 of the Polish Law, promulgated on 11th December, 1946, concerning the punishment of war criminals and traitors, provides that :

> " The fact that an act or omission was caused by a threat, order or command does not exempt from criminal responsibility.

(1) *Ibid.*, p. 96.

" In such a case the Court may mitigate the sentence taking into consideration the circumstances of the perpetrator and the deed."

Article VIII (in paragraphs 1–2) of the Chinese Law of 24th October, 1946, simply provides that:

" The following circumstance under which offences have been committed shall not exonerate war criminals:

1. The fact that crimes were committed by order of Superior Officers.
2. The fact that crimes were committed as result of official duty."

So also Article 4 of the Luxembourg War Crimes Law of 2nd August, 1947, provides, *inter alia*, that orders or permission given by the enemy authority or by authorities depending on the latter shall not be regarded as justifying circumstances within the meaning of Article 70 of the Luxembourg *Code Pénal.*

Again, Article 13 (3) of the Czechoslovak Law No. 22 of 24th January, 1946, provides that:

" (3) The irresistible compulsion of an order from his superior does not release any person from guilt who voluntarily became a member of an organization whose members undertook to carry out all, even criminal, orders."

No special provision relating to the plea of superior orders has been made in the Netherlands War Crimes Law of July 1947 (Statute Book H.233), since the existing provisions of the Netherlands Penal Code concerning superior orders are deemed sufficient. Article 43 of that Code states that:

" A person is not punishable who commits an act in the execution of an official order given him by the competent authority.

" An official order given without competence thereto does not remove the liability to punishment unless it was regarded by the subordinate in all good faith as having been given competently and obeying it came within his province as a subordinate."

The Judge Advocate acting in the Canadian war crime trial to which reference has already been made, after citing Lord Hale,[1] continued:

" Sir J. Stephens expresses the opinion that in most if not all cases the fact of compulsion is matter of mitigation of punishment and not matter of defence. This principle is older than Bacon's maxims, ' Urgent necessity no matter how grave is no excuse for the killing of another ', and to the same effect, in the case of *Regina* v. *Stephens*, where three shipwrecked sailors drew lots, killed and ate the loser to preserve their own lives. This was held to be murder—a crime. Accordingly, if the Court do find that Holzer fired after having been subjected to dire threats on his own life, on which there is conflicting testimony, even then he is not excused upon the above-mentioned fundamental principles, but it more properly goes in mitigation of punishment."

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[1] See p. 16.

The Judge Advocate interpreted the defence plea that superior orders might, in the circumstances of the case, have constituted a defence under German law not as a claim that German law was applicable in proceedings before the Canadian Court but as a submission that the Court take that fact into consideration in coming to their decision.

Despite the fact that most of the regulations governing trials by United States Military Commissions have included provisions defining the applicability of the plea of Superior Orders, reference has often been made during trials before such Commissions, to the United States Basic Field Manual F.M. 27-10 (*Rules of Land Warfare*) which is similar in scope and purpose to the *British Manual of Military Law*, and has the same persuasive authority.(1) The United States *Manual* contains in its paragraph 345, the following words :

> " Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."(2)

The enactments and other authorities set out above make it clear that, while the Defence can never claim that superior orders represent an absolute defence which would remove the legal guilt of the prisoner (as would, for instance, a successful plea of insanity), the Court may consider the fact that an offence was committed under orders as a mitigating circumstance and may therefore inflict a lighter penalty than would have been imposed, or may impose no penalty at all. The words of Professor Michel de Jüglart in *Répertoire Méthodique de la Jurisprudence Militaire* are indeed true not only of the French approach to the plea but also of that generally adopted by those responsible for the legislation for, and judging of, war crime cases arising out of the second world war. After pointing out that it would have been possible for the legislator either to lay down that the plea of superior orders always represented a complete defence or to prescribe in advance the exact circumstances in which it would or would not constitute such a defence, Professor de Jüglart continues :

> " There exists an intermediate approach which the legislators of the Ordinance of 1944 have adopted ; it consists in excluding in general the command of the law or the orders of legitimate authority as a justifying circumstance, while retaining them as an extenuating factor or excuse. The criminal character of the act therefore always remains but an individualization of the penalty, imposed more or less severely according to the case, permits a modification of the consequences. . . ."

### 4. THE PLEA OF LEGALITY UNDER MUNICIPAL LAW

It has been seen that the fact that the accused were bound under Japanese Law to obey the " Enemy Airmen's Law," which permitted the passing of

(1) See Vol. I, p. 19.
(2) The provisions of the Field Manual on this point were quoted for instance by the Defence in the Trial of General Anton Dostler, by a United States Military Commission in Rome (8th-12th October, 1945). See Vol. I, pp. 22-34.

the death sentence on certain captured fliers, was regarded by the Commission as representing a mitigating circumstance.(1) The legislators and the judges who have had the task of dealing with war crime cases in recent years have taken much the same attitude towards the plea that an accused's act was legal under his own municipal law as towards the plea of superior orders, although it should be remembered that the former plea is usually put forward in the form of a claim that an accused's act was *permitted* by the law of his country, not that it was *compulsory* under that law.

The texts which have been quoted under the previous heading (2) are, in the sense that laws may be regarded as a type of superior orders, all relevant in this connection, and in fact, the Belgian law of 20th June, 1947, relevant to the competence of Military Tribunals in the matter of war crimes actually includes the words : " The fact that the accused acted in accordance with the provisions of enemy laws or regulations " in setting out the circumstances which cannot be regarded as a reason for justification of crimes when the act committed constituted a flagrant violation of the laws and customs of war, or the laws of humanity.(3)

Article 3 of the French Ordinance of 28th August, 1944, also places the plea of alleged legality under municipal law on the same footing as the plea of superior orders,(4) and a similar provision is contained in Article 4 of the Luxembourg War Crimes Law of 11th August, 1947.

Again, Article 13 (1) of a Czechoslovak Law of 24th January, 1946, relating to the punishment of war criminals and traitors, states that :

> " Acts punishable under this law are not justified by the fact that they were ordered or permitted by the provisions of any law other than Czechoslovak Law or by organs set up by any state authority other than the Czechoslovak, even if it is claimed that the guilty person regarded these invalid provisions as legal."

The defence that the accused's acts were justified in their own municipal law received consideration in the *Belsen Trial*, but was rejected by the Military Court which tried the case.(5) Again, the Judgment of the Military Tribunal before which *The Justice Trial* (6) was conducted pointed out that : " The defendants contend that they should not be found guilty because they acted within the authority and by the command of the German laws and decrees." After quoting the provisions of Control Council Law No. 10 as to the plea of superior orders,(7) and also the provision therein for the punishment of crimes against humanity whether or not in violation of the domestic laws of the country where perpetrated, however, the Judgement went on to point out that : " The very essence of the prosecution case is that the laws, the Hitler decrees and the Draconic, corrupt, and

(1) See p. 7.
(2) See pp. 13-22.
(3) See p. 20.
(4) See p. 20.
(5) See Vol. II of this series, pp. 34-35, 77 and 107-108.
(6) See p. 81.
(7) See p. 19.

perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignity participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence to the charge."

## CASE No. 26.

# TRIAL OF SERGEANT-MAJOR SHIGERU OHASHI AND SIX OTHERS

AUSTRALIAN MILITARY COURT, RABAUL
20TH–23RD MARCH, 1946

## A. OUTLINE OF THE PROCEEDINGS

### 1. THE CHARGES

Sergeant-Majors Shigeru Ohashi and Yoshifumi Komoda, together with five other members of the Japanese Military Police, were accused of murdering a number of named victims, who were described in the charge as one half-caste and seventeen natives, on 18th September, 1944.

The accused pleaded not guilty.

### 2. THE EVIDENCE

The evidence showed that during September, 1944, the eighteen victims, who were civilian inhabitants of New Britain then in the occupation of Japan, were beheaded at Vunarima after a summary trial for acts of sabotage and other acts hostile to the Japanese Army and defined as war crimes in their military code. The accused claimed that all the deceased were guilty of a conspiracy against the armed forces of Japan in pursuance of which individual conspirators concealed weapons, stole grenades and rations, blew up a petrol dump and attacked, on one occasion, a Japanese soldier, and on another a Japanese civilian. These allegations were not denied.

Defence evidence, which was unrebutted, showed that the native victims had pleaded guilty to the charges against them after these had been read out to them. All accused were in court at once and were allowed to make their explanations. Two prosecution witnesses were produced to give evidence against them, and the proceedings were interpreted either by the interpretor or by Komoda. On the other hand, the evidence of the two witnesses was said to have occupied only about four minutes in all, the Court conferred for about ten minutes on the verdict, and ten minutes on the sentence, and the trial as a whole lasted only about fifty minutes. No defending officer was provided for the victims; according to Ohashi's evidence this was " in view of the time element," and the half-caste addressed the Court on behalf of all the accused. The executions began about an hour after the termination of the trial.

General Immamura, Commander-in-Chief of the Japanese Eighth Army Group, who commanded the Rabaul area at the relevant time, said that he declared Vunarima an emergency area in April, 1944, that where inhabitants of an occupied territory were charged with war treason or war rebellion they were under normal conditions sent for trial by court martial, but that " under pressing circumstances unit commanders would have the authority which had been provided by the Emperor to carry it out on their own for the protection of the army."

Later he referred to summary trials in the field, and to the wide discretion accorded to unit commanders not only as to the convening and constitution of the courts but also as to the penalty meted out. He further testified that confirmation of sentence would normally be required and that confirmation by the Provost Marshal should have been sufficient in the circumstances of the case.

In short, General Immamura's evidence was that the Japanese government had directed a summary trial in the field for war criminals under certain operational conditions, and that those conditions existed at Vunarima in September, 1944.

The Provost Marshal, Colonel Kikuchi, stated that he confirmed the finding of the Japanese Tribunal and authorized the execution and that he believed the trial to be a fair and just one.

The evidence of General Immamura and Colonel Kikuchi that in case of emergency a summary trial could be convened instead of a court martial for trial of war crimes as defined by Japanese law was supported by documentary evidence. It was claimed by the Defence witnesses that the emergency justifying such a summary trial was a threatened attack by other natives to rescue the deceased who were then held in custody for investigation of their alleged war crimes against the Japanese, that Lt. Yamada, who was not among the accused, decided to hold the summary trial, that the proper procedure was observed by the Court and that the sentences were confirmed by superior authority before being carried into execution.

The accused Ohashi and Komoda, with their superior officer Lt. Yamada, were members of the summary court which convicted the deceased. Ohashi and Komoda also took part in the execution.

A third accused acted as interpreter during the trial and also took part in the execution.

Four other accused were shown to have taken part in carrying out the orders for the execution of the victims, but not to have been present at their trial or to have had any knowledge of the nature of those proceedings.

### 3. THE FINDINGS AND SENTENCES

Ohashi and Komoda were found guilty and sentenced to life imprisonment. The other accused were found not guilty.

The two life sentences were commuted to sentences of imprisonment for two years by the Confirming Officer.

## B. NOTES ON THE CASE

### 1. THE JURISDICTION OF THE AUSTRALIAN MILITARY COURT

During his summing up, the Judge Advocate serving with the Australian Military Court which tried the case pointed out that: " The charge is one covered by the War Crimes Act 1945 and the jurisdiction of the Court has

been established by the unchallenged evidence of the residence of the natives and the events occurring in an Australian Territory."

The legal basis, jurisdiction, composition and procedure of the Australian Military Courts for the trial of war criminals are further examined in the Annex to this Volume.(1)

2. THE LAW BINDING ON THE COURT

During his summing up, the Judge Advocate set out as follows the rules which the Court was to observe :

> " 1. The War Crimes Act, the Hague Conventions and the judgments of superior British and Australian courts are binding on you.
>
> " 2. Text books by learned jurist such as Oppenheim, and the Manual of Military Law in its explanatory passages are strongly persuasive and should be followed by this Court unless it is well satisfied to the contrary.
>
> " 3. You will use in your deliberations your common knowledge and your military knowledge but no other peculiar or expert knowledge any of you may possess. . . ."

The explanatory passages of the Australian *Manual of Military Law* were classified by the Judge Advocate as constituting a " strongly persuasive " authority. In so far as it describes the state of international law and does not simply reproduce the text of the Hague and Geneva Conventions, this *Manual* like the British *Manual of Military Law* and the United States Basic Field Manual F.M. 27-10 (*Rules of Land Warfare*), though not a source of law like a statute, prerogative order or decision of a court, is a very authoritative publication.(2)

3. THE STATUS OF THE VICTIMS

The Judge Advocate advised the Court that :

> " By the Laws and Usages of War inhabitants of occupied territories have not only certain rights but owe certain duties to the occupant, who may punish any violation of those duties.
>
> " Certain acts if committed by such inhabitants are punishable by the enemy as war crimes.
>
> " Amongst such acts are :
>
> (*a*) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces.
>
> (*b*) Espionage and war treason.
>
> " The deceased would, being civilian inhabitants of an occupied territory, be guilty of the war crime known as War Rebellion if they rose in arms against the occupant.

(1) See p. 94.
(2) See Vol. I of this series, pp. 19 and 32.

" War treason includes such acts by private individuals as damage to war material or conspiracy against the armed forces or against members of them."

After stating that the allegations of the accused that the deceased had been guilty of acts of hostility against the Japanese armed forces had not been rebutted and were entitled to be believed, the Judge Advocate continued:

" Their actions rendered the deceased liable to punishment as war criminals.

" Charges of war crimes may be dealt with by military courts or such courts as the belligerent concerned may direct.

" In every case there must be a trial before punishment and the utmost care must be taken to confine the punishment to the actual offender.

" All war crimes are liable to be punished by death.

" So far as I have been able to ascertain . . . there is no provision in International Law relating to the composition of such courts or the procedure to be followed at the trials.

" The type of trial to which the deceased were entitled was therefore subject to certain fundamental principles of justice, that were directed by Japan."

The advice of the Judge Advocate regarding the rights of the deceased(1) and the decision of the Military Court must therefore be regarded as authorities more particularly on the rights under International Law of alleged war criminals.

Among the acts defined as war crimes in Oppenheim-Lauterpacht *International Law*, Vol. II, Sixth Edition revised, are the following: " (2) All hostilities in arms committed by individuals who are not members of the enemy armed forces, (3) espionage and war treason."(2)

It is later stated that: " Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces, and the enemy has, according to a customary rule of International Law, the right to treat such individuals as war criminals. But they cease to be private individuals if they organize themselves in a manner which, according to the Hague Convention, confers upon them the status of members of regular forces. Espionage and war treason . . . bear a two-fold character. International Law gives a right to belligerent to use them. On the other hand, it gives a right to belligerents to consider them, when committed by enemy soldiers or enemy private individuals within their lines, as acts of illegitimate warfare, and consequently punishable as war crimes. . . .

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(1) See pp. 30-1.

(2) See p. 451 of the work cited.

" War treason consists of all such acts (except hostilities in arms on the part of the civilian population, spreading of seditious propaganda by aircraft, and espionage) committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy. War treason may be committed, not only in occupied enemy country, or in the zone of military operations, but anywhere within the lines of a belligerent."(1)

The provisions of the Hague Convention which define the limits of the category of persons which " enjoy the privileges of armed forces " (to use the same phrase as the authority just quoted) are those contained in Chapter I (The Status of Belligerent) :

" Art. 1. The laws, rights, and duties of war apply not only to army, but also to militia and volunteer corps fulfilling all the following conditions :

(1) They must be commanded by a person responsible for his subordinates ;

(2) They must have a fixed distinctive sign recognizable at a distance ;

(3) They must carry arms openly ; and

(4) They must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination " army ".

" Art. 2. The inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with article 1, shall be regarded as belligerents if they carry arms openly, and if they respect the laws and customs of war.

" Art. 3. The armed forces of the belligerents may consist of combatants and non-combatants. In the case of capture by the enemy, both have the right to be treated as prisoners of war."(2)

---

(1) *Loc. cit.*, p. 454. In an interesting footnote it is stated that : " The following are the chief cases of war treason that may occur : (1) Information of any kind given to the enemy ; (2) Voluntary supply of money, provisions, ammunition, horses, clothing, and the like, to the enemy ; (3) Any voluntary assistance to military operations of the enemy, be it by serving as guide in the country, by opening the door of a defended habitation, by repairing a destroyed bridge, or otherwise ; (4) Attempting to induce soldiers to desert, to surrender, to serve as spies, and the like ; negotiating desertion, surrender, and espionage offered by soldiers ; (5) Attempting to bribe soldiers or officials in the interest of the enemy, and negotiating such bribe ; (6) Liberation of enemy prisoners of war. (As to the execution, during the first World War, of Miss Cavell, who was nursing in Brussels, on a charge of having assisted allied soldiers to escape, see Garner, ii, ss. 382-386) ; (7) Conspiracy against the armed forces, or against individual officers and members of them ; (8) Wrecking of military trains, destruction of the lines of communication or of telegraphs or telephones in the interest of the enemy, and destruction of any war material for the same purpose ; (9) Intentional false guidance of troops by a hired guide, or by one who offered his services voluntarily ; (10) Rendering courier, or similar, services to the enemy."

(2) As to the legal position of inhabitants of occupied territory who take up arms against the enemy, see also pp. 37 and 51 of this volume, and also pp. 21-22 of Vol. III.

Elsewhere it is said that: " War treason is a comprehensive term for a number of acts hostile to the belligerent within whose lines they are committed; it must be distinguished from real treason, which can only be committed by persons owing allegiance, albeit temporary, to the injured State. War treason can be committed by a soldier or an ordinary subject of a belligerent, but it can also be committed by an inhabitant of occupied enemy territory, or even by a subject of a neutral State temporarily staying there, and it can take place after an arrangement. In any case, a belligerent making use of war treason acts lawfully, although the Hague Regulations do not mention the matter at all."(1)

Of espionage the same authority writes, *inter alia*, that: " No regard is paid to the status, rank, position, or motive of a spy. He may be a soldier or a civilian, an officer or a private. He may be following instructions of superiors, or acting on his own initiative from patriotic motives."(2)

4. DENIAL OF A FAIR TRIAL

The Judge Advocate further advised the Court that the accused would be entitled to an acquittal if it had been proved that " the deceased had a fair and reasonable trial, that such trial was of the kind directed by Japan and that the accused were authorized to take part in such trial and execution." It was " for the belligerent to decide the form of trial subject to certain fundamental principles of justice."

The Judge Advocate continued:

" I consider these principles to be:

" (*a*) Consideration by a tribunal comprised of one or more men who will endeavour to judge the accused fairly upon the evidence using their own common knowledge of ordinary affairs and if they are soldiers their military knowledge, honestly endeavouring to discard any preconceived belief in the guilt of accused or any prejudice against him.

" (*b*) The accused should know the exact nature of the charge preferred against him.

" (*c*) The accused should know what is alleged against him by way of evidence.

" (*d*) He should have full opportunity to give his own version of the case and produce evidence to support it.

" (*e*) The court should satisfy itself that the accused is guilty before awarding punishment. It would be sufficient if the court believed it to be more likely than not that the accused was guilty.

" (*f*) The punishment should not be one which outrages the sentiments of humanity.

(1) Oppenheim-Lauterpacht, *loc. cit.*, pp. 331-332.
(2) *Loc. cit.*, p. 331. And see also p. 56 of this volume.

" Unless provision is made for observance of all of these principles I do not consider any other form of proceedings which a belligerent might direct would in law really amount to a trial."

The Judge Advocate later added: " Furthermore you should give close attention to the question of good faith in the accused as regards holding the proceedings at all as that has a direct bearing on deciding what was their attitude during the proceedings, keeping in mind of course their relationship towards Lt. Yamada. . . . You will consider whether at such proceedings the deceased did in fact plead guilty and the effect such a plea would have on the minds of the tribunal in arriving at a verdict and sentence."

He also pointed out that the executioners would be entitled to the defence of justifiable homicide if it had been shown that each was a " proper officer executing a criminal in conformity with his sentence."

The Court found not guilty those accused who had taken part in the execution of the victims but had not acted as their judges, including the accused who had acted as interpreter. Those found guilty were the two accused who had acted as judges at a trial which, according to the evidence of the Defence themselves, lacked any representation of the accused by Counsel and occupied only about 50 minutes and was followed rapidly by execution of sentence, in which those found guilty by the Australian Military Court participated. It will be noted, however, that the accused were allowed to address the court and pleaded guilty, that the proceedings were interpreted, and, finally, that the sentence passed by the Australian Military Court, as commuted, was a relatively light one.

### 5. SUPERIOR ORDERS

The Judge Advocate stated that the Court should consider, *inter alia*, the question whether the proceedings against the deceased were " conducted in accordance with the directions given by Japan." He later added: " You should bear in mind that the accused were soldiers, consider what orders were given them, and their duty to obey, also the limited protection afforded subordinates by superior orders as explained in the *Manual of Military Law*, Australian Edition, page 288, para. 443, as amended which I will read out to you."

It seems therefore that the Judge Advocate was willing to concede that the plea of superior orders would afford some limited protection if the acts of the accused were actually conducted as laid down by those orders. The passage from the Australian *Manual of Military Law* to which the Judge Advocate referred is in the same terms as the passage from paragraph 443 of the British *Manual*, which has already been quoted.(1)

(1) See p. 14.

## CASE No. 27.

# TRIAL OF
# CAPTAIN EITARO SHINOHARA AND TWO OTHERS

AUSTRALIAN MILITARY COURT, RABAUL
30TH MARCH—1ST APRIL, 1946

## A. OUTLINE OF THE PROCEEDINGS

### 1. THE CHARGES

The accused, Captains Eitaro Shinohara, Toyoji Nemeto and Takeyasu Shoji were charged with " violation of the Laws and Usages of War in that they in May, 1945, when members of a Military Court convened to try two natives of Kanbanguru failed to ensure that such natives were afforded a fair and proper trial."

The accused pleaded not guilty.

### 2. THE EVIDENCE

The village of Kanbanguru, which was under Japanese occupation, had failed to supply to the Japanese its quota of *sac sac* in April, 1945, and Sgt. Kenji Arai of the Japanese Military Police, who was in charge of the area sent inhabitants of the district to contact the villagers who had gone into hiding. The latter proved hostile and Arai reported accordingly to Captain Shinohara, who sent him five or six Japanese and instructed him to find out where the natives had gone. Two patrols were sent out and were also met with a hostile reception. Captain Shinohara then ordered Arai to bring the villagers into Branba, which he did without serious casualties, although there was some evidence that bows, arrows and spears were used by the villagers. Sgt. Arai interrogated the captives and reported that five native inhabitants were responsible for the resistance to the Japanese. Captain Shinohara then came to Banba and question the five, two of whom he considered principal offenders. He returned to Moim, and three days later again came to Branba with Captain Nemoto and Captain Shoji. These three officers interrogated the two native inhabitants selected by Captain Shinohara as the leaders.

The three officers then returned to Moim and a written order was received by Arai a few days later to execute the two villagers.

According to a statement by Sgt. Arai which was put in as evidence at the Australian trial, the two had been found guilty under Japanese military law of :

(i) Opposition to the Japanese Army.

(ii) Trying to influence other natives to oppose the Japanese Army.

Arai also claimed that several prosecution witnesses were heard and the natives accused admitted their guilt. The proceedings including the charges were interpreted and the examination of each accused lasted about one and a half hours. The trial was not public.

A statement by the accused, Captain Eitaro Shinohara, which was put in as evidence, stated, *inter alia*, that, after conducting an investigation at Branha, he reported to Headquarters 51 Div. Inf. Gp. that the two natives were guilty of rebellion. Captain Shoji arrived from headquarters with a convening order for a court martial at Branba naming Shinohara as President and Captain Shoji and Captain Nemoto as members. Shinohara showed the reports made by Arai and himself to Shoji and Nemoto. A court was then held ; Papaku and Maran were called in separately and were questioned by Nemoto and Shoji. The accused Shinohara's statement went on to say that, while the accused and Sgt. Arai remained in the room the three judges looked up the Rules for Court Martial Procedure and agreed that the accused were guilty, under Rule 25 thereof, of rebellion " by carrying weapons, resisting the Japanese and inciting others to take hostile actions against the Japanese." The death penalty was provided as the only penalty for the leaders of a rebellion. Major-General Kawakubo confirmed the sentence of death.

Shinohara stated that, because of his previous investigations, he knew before the trial started that the accused were both guilty, and he did not question them.

A statement by the accused Captain Toyoji Nemoto, which was put in as evidence stated, *inter alia :*

> " When the trial opened Captain Shinohara, Captain Shoji, Sergeant Arai, the two accused and myself were present. We all remained together until sentence had been pronounced. . . . The records of Sgt. Arai's and Captain Shinohara's previous investigations were before us. Captain Shoji and I began the trial by asking the natives questions . . . The natives told us that they had led the other villagers into failure to co-operate with the Japanese. The natives said that they realized that they had done wrong in doing so. Captain Shoji and I then decided that both accused were guilty of treason under Rules of Court Martial Procedure, Clause 24 or 25. We decided they should be sentenced to death.
>
> " The offence of which we considered them guilty was treason in that they took up arms against the Japanese. The offence of failure to supply *sac sac* does not carry a death penalty and we did not convict them of that offence. We told Captain Shinohara of the charges of which we thought they were guilty and the sentence we thought appropriate. He thought for a moment and then said that he agreed with us and sentenced the accused to death. . . .
>
> " The accused had no defending officer or advocate. No witnesses were called at the trial, but documentary evidence of the previous investigations by Captain Shinohara and Sergeant Arai was before

the Court. The trial took about four hours. After sentence was pronounced the accused were taken away in custody. A record of the trial was sent to Major General Kawakubo who later confirmed the sentence."

A statement by the accused Captain Takeyasu Shoji included the following words :

> " I was sent by Major General Kawakubo to be recorded and observer of a trial of two natives at Branba in May, 1945. . . .
>
> " Members of the court were Captain Shinohara, Captain Nemoto and Sergeant Arai. When the Court opened the two natives were asked questions by Captain Nemoto and Captain Shinohara. I asked no questions as I had no prior knowledge of the facts. . . . The three officers and Sergeant Arai then went into a room. Captain Nemoto and Sergeant Arai conferred and then told me that the accused were guilty of treason under Clause 26 of the Rules of Court Martial Procedure and deserved the death penalty.

Shoji and Shinohara agreed with them.

Finally, Major-General Kawakubo Shizuma, in a pre-trial statement, said that he had convened the Court and had decided upon its composition. The appointment of Defending Counsel was not provided for in the relevant Japanese Army Order, and in any case no such counsel was available.

### 3. THE FINDINGS AND SENTENCES

The accused were found guilty and each sentenced to imprisonment for five years. These findings and sentences were not, however, confirmed.

## B. NOTES ON THE CASE

In the course of his argument addressed to the Court, the Prosecutor claimed that to prove that a fair trial had been held it must be shown :

(i) that there was an impartial tribunal ;

(ii) that the accused was notified of the charge before the producing of evidence ;

(iii) that some evidence was given in Court against the accused ;

(iv) that the accused was protected against incriminating himself before the Court ;

(v) that he was given the right to call witnesses and to speak in mitigation ; and

(vi) that he was " given defending counsel or the procedure " [*sic*] and his rights were explained to him.

The Prosecutor claimed that it was irrelevant whether or not the accused had regarded the trial as a fair one.

The Defending Officer's aim, in replying, was to emphasize the evidence which had been produced and which tended to show that the first, second and third requirements set out above had been fulfilled ; he did not attempt to deny that any of these was not in fact essential to a fair trial.

There was also proof, affirmed Defending Counsel, that the accused were allowed to speak in their own defence and that an interpreter was employed at the trial.

The Defence claimed that there was no proof that the victims were not allowed Counsel, and that in any case there was " no obligation on the prosecution to employ a counsel for defence."

The Defence further stated that it was quite legal to obtain statements from persons without their knowing the purpose of such action and claimed that this practice was followed by the Australian authorities in dealing with alleged Japanese war criminals. Further, he did not consider that it was essential to a fair trial that it should be held in public, and cited the trials of spies held during war-time as indicating that secret trials are not necessarily unfair. Counsel also emphasized the legality of exacting the death penalty for war crimes.

Defence Counsel claimed on behalf of the accused the defence of military necessity and quoted paragraph 366 of Chapter XIV of the Australian *Manual of Military Law* :

> " If demanded by the exigencies of war, it is within the power of the occupant to alter or suspend any of the existing laws, or to promulgate new ones, but important changes can seldom be necessary and should be avoided as far as possible."

The Judge Advocate acting with the Australian Military Court pointed out that it was " not in issue whether or not the accused were properly appointed to constitute a court for the trial of the two natives." Further, he pointed out, it was conceded by the prosecution that there was sufficient evidence before that court to justify its finding one of the natives guilty of war rebellion provided that he was first given a fair trial.(1) The Judge Advocate also affirmed that the victims were entitled to such a trial.

The Judge Advocate referred to paragraph 449 of Chapter XIV of the Australian *Manual of Military Law* which states that : " Charges of war crimes may be dealt with by military court or by such courts as the belligerent concerned may determine. In every case, however, there must be a trial before punishment, and the utmost care must be taken to confine the punishment to the actual offender."

A footnote to this paragraph, he pointed out, emphasized that " ' Previous trial is in every case indispensable.' (Hague Conference, 1899, p. 146)."

(1) See pp. 27-30.

He went on to state that international law did not appear to lay down any fixed form of procedure for Military Courts trying civilian inhabitants of occupied territories. That appeared to him to be at the discretion of the belligerent in occupation, subject to the fundamental principles of justice being observed.

The Judge Advocate then proceeded to set out the six fundamental principles which were essential to a fair trial, in the same words as those used by him in the trial of Shigeru Ohashi and Six Others.(1)

It will be noted that the victims of the offence proved in the case just reported were not furnished with the services of a Defence Counsel, or, apparently, any other aid in presenting their defence, and that Shinohara, the President of the Court, confessed to having been convinced of the guilt of the captives even before the opening of the trial. Further, the charge sheet was interpreted in Pidgin English and not in a language native to the accused ; (2) the same seems to have been true of the interpretation of the rest of the proceedings. On the other hand, some documentary evidence was produced (whether Prosecution witnesses were also called is uncertain), the accused confessed to having done wrong, and there was evidence of both having been interrogated for some time by the Court before sentence of death was passed. The three judges who imposed this sentence were held guilty of failing to insure a fair and proper trial, but the Australian Military Court which tried them decided that imprisonment for five years would be a sufficient penalty, and the confirming authority refused confirmation of the finding and sentences. This case provides an interesting illustration of the limits beyond which liability arising out of the denial of a fair trial will not extend.

(1) See pp. 30-1.

(2) Sergeant Arai was asked by the Australian Court to repeat in pidgin the charge against the two villagers. The result could not be said to convey with any accuracy the offence charged : " No. 1 Capt. belong Kumbumburu Name belong him Popaku. Boss boy belong Kambamburu. Name belong him Maran. You two fello you make him trouble along Japan soldier. Dis peela trouble now make court."

## CASE No. 28.

# TRIAL OF CAPTAIN EIKICHI KATO

AUSTRALIAN MILITARY COURT, RABAUL
7TH MAY, 1946

## A. OUTLINE OF THE PROCEEDINGS

### 1. THE CHARGES

The accused was charged of the murder of seven civilian inhabitants of North Bougainville between September 1943 and October 1945.
He pleaded not guilty.

### 2. THE EVIDENCE

The accused admitted that he had ordered the execution of six of the persons mentioned in the charges. He attempted to justify his action by saying that the victims were attached to the Japanese forces, but that they had been proved to be hostile and that after an investigation he had ordered them to be killed to prevent them from escaping and giving information to the Australians, and " to carry out our operation and to keep the order and peace of our unit." He alleged that he had read reports of interrogations and had discussed the matter with his staff officers before ordering the two sets of executions, and that the acts of the deceased constituted war treason and espionage within the meaning of the Japanese laws. The nearness of the Australian Army and the general military situation had prevented the holding of a court.

### 3. FINDINGS AND SENTENCE

He was found guilty of the murder of the six victims and sentenced to death.

The finding and sentence were confirmed by higher military authority.

## B. NOTES ON THE CASE

The attitude of the Court to the legal status of the victims cannot be ascertained, but the Judge Advocate drew its attention to the provisions of international law regarding espionage and war treason as described in two paragraphs in Chapter XIV of the Australian *Manual of Military Law* :

> " 158. It is lawful to employ spies and secret agents, and even to gain over by bribery or other means enemy soldiers or private enemy subjects. Yet the fact that these methods are lawful does not prevent the punishment, under certain conditions, of the individuals who are engaged in procuring intelligence in other than an open manner as combatants. Custom admits their punishment by death, although a more lenient penalty may be inflicted.

" 159. The offence is punishable whether or not the individuals succeed in obtaining the information and conveying it to the enemy."

The Judge Advocate made reference to Articles 29 and 30 of the Hague Convention relating to spies and their right to a trial.(1)

At the same time the Judge Advocate drew the Court's attention to the following paragraphs in Chapter XIV of the *Manual* relating to reprisals:

" 386. If, contrary to the duty of the inhabitants to remain peaceful, hostile acts are committed by individual inhabitants, a belligerent is justified in requiring the aid of the population to prevent their recurrence and, in serious and urgent cases, in resorting to reprisals.

" 387. An act of disobedience is not excusable because it is committed in consequence of the orders of the legitimate Government, and any attempt to keep up relations with that Government or to act in understanding with it, to the detriment of the occupant, is punishable as war treason.

" 452. Reprisals between belligerents are retaliation for illegitimate acts of warfare, for the purpose of making the enemy comply in future with the recognized laws of war. They are not referred to in the text of the Hague Rules, but are mentioned in the report presented to the Peace Conference of 1889 by the Committee which drew up the Convention respecting the Laws and Customs of War on Land. They are by custom admissible as an indispensable means of securing legitimate warfare. The mere fact that they may be expected, if violations of the laws of war are committed, acts to a great extent as a deterrent. They are not a means of punishment or of arbitrary vengeance, but of coercion.

" 455. Although there is no rule of International Law respecting the matter, reprisals should never be resorted to by the individual soldier, but only by order of a commander.

" 459. What kinds of acts should be resorted to as reprisals is a matter for the consideration of the injured party. Acts done by way of reprisals must not, however, be excessive and must not exceed the degree of violation committed by the enemy."

The Court appears from its decision to have rejected any idea that the killings might have been justified as reprisals,(2) and to have held that, whether the victims had been guilty of espionage or war treason or not, and whatever the motive of the accused was in his ordering their shooting, they had not been granted the right to a fair trial. A mere discussion between officers as to the merits of a case, based upon reports of interrogations, would not in fact constitute a trial.(3)

(1) Regarding espionage and war treason see pp. 27-30 of this volume and also p. 56.
(2) The law relating to reprisals is to receive further treatment in a subsequent volume of these reports.
(3) See also p. 57, footnote[1], relating to a similar claim, also unsuccessful, that a decision based upon the result of previous interrogations would constitute a trial.

## CASE No. 29.

# TRIAL OF
# KARL BUCK AND TEN OTHERS

BRITISH MILITARY COURT, WUPPERTAL, GERMANY
6TH-10TH MAY, 1946

## A. OUTLINE OF THE PROCEEDINGS

The accused, Hauptsturmführer Karl Buck, Untersturmführer Robert Wunsch, Oberleutnant Karl Nussberger, Wachtmeister Erwin Ostertag, Oberwachtmeister Joseph Muth, Zugwachtmeister Bernhard Josef Ulrich, Oberwachtmeister Heinrich Neuschwanger, Wachtmeister Dinkel, Wachtmeister Helmut Korb, Wachtmeister Xavier Vetter and Sturmscharführer Zimmermann, were charged with committing a war crime, in that they, at Rotenfels Security Camp, Gaggenau, Germany, on 25th November, 1944, in violation of the laws and usages of war, were concerned in the killing of six British prisoners of war, all of No. 2 Special Air Service Regiment, four American prisoners of war, and four French Nationals ; the victims were all named in the charge. The accused pleaded not guilty.

It was shown that the deceased were prisoners at Rotenfels Camp. On 25th November, 1944, they were taken in a lorry to a wood, where they were all shot to death.

Buck was in charge of the camp of Schermeck in Alsace and, by virtue of that office, was also Lager Kommandant at the Camp at Gaggenau. Wunsch was the man through whom he carried out his administrative duties at the latter place : Buck, who claimed in Court to have received orders from Dr. Isselhorst, who was in charge of the Security Police and S.D. in the South West, that certain prisoners including the British and American prisoners of war should be shot, confessed that, having first had the victims transferred from Schermeck to Gaggenau and having tried to evade the command, he ordered Wunsch to have the prisoners of war and certain others shot, and to destroy all the evidence.

Wunsch claimed that he was in charge of Gaggenau only from the point of view of its general administration, and that Nussberger was in charge of the police. There was other evidence independent of that of Wunsch indicating that this accused was not responsible for the police who were in charge of the security of the camp. Wunsch pleaded that he acted as a mere messenger in passing on to Nussberger Buck's orders for the shooting of specified prisoners ; had Nussberger been present when Buck called at the camp, the orders would have been given to him directly.

There was evidence that Nussberger was present when the prisoners were being loaded into the lorry which took them to the wood, and that he told the driver to get away as quickly as possible. This accused claimed that he was present when Buck delivered his orders to Wunsch, that his own

part was merely to tell Neuschwanger, a guard, to report to Wunsch for orders and that it was actually Wunsch who gave the necessary instructions to Neuschwanger.

The driver gave evidence that Neuschwanger was in charge of the lorry and, together with Ostertag and Ulrich, took the prisoners into the wood to be shot. Neuschwanger claimed that he had been detailed by Ostertag but confessed to having taken part in the shooting.

Ulrich, a guard, also claimed to have been detailed by Ostertag and also confessed to a part in the shooting.

Ostertag made a similar confession, but claimed that, although his own rank in the Schutzpolizei was actually higher than that of Neuschwanger, the latter had been put in charge of the shooting by Nussberger because he knew better the place selected.

Dinkel, Korb and Vetter were shown to have guarded such victims as remained in the lorry during the period while the prisoners were taken into the wood in small groups to be shot. Korb and Vetter claimed to have demonstrated at the time their unwillingness to take part in any executions, and Dinkel to have had no knowledge of the purpose of the mission until the shooting began. Neuschwanger and Vetter, however, stated that Dinkel took some part in accompanying prisoners into the wood.

There was evidence that Zimmermann, a member of the S.S. paraded the prisoners before they left on the lorry, knowing that the latter were to be shot.

Muth's part consisted only in guarding several Russian prisoners who had been taken with the others in case they were needed to dig graves. He did not go to the scene of the shooting until after its completion.

Statements by Vetter, Korb and Ulrich indicated that some of the victims were still in uniform when shot. It was clear from the words of Wunsch and Neuschwanger that these two accused also knew that the persons shot included prisoners of war. Ostertag claimed that all the victims were civilian clothing.

One of the Prosecution witnesses, an intelligence officer of the No. 2 Special Air Service Regiment, to which the British victims belonged, stated in the course of cross-examination that it was not among the tasks of the Special Air Service to organize and support the Maquis, but that members of the Regiment did naturally have connection with members of the Maquis, " because at this particular time the operation which was mounted in the Vosges area was mounted at a time at which the Maquis had risen against the German invaders."

The Defence called as a witness Dr. Isselhorst, Commander of the Security Police and S.D. in the South West in November, 1944. He stated that he had first had to deal with the so-called Leader Order of 18th October, 1942, when, in August, 1944, he had had his first reports of the British Special

Airborne Service during an operation against the Maquis. According to the witness's interpretation the Order provided that all baled-out or parachuted personnel of the Allied Forces who came down behind the German lines were to be killed without mercy. He had enquired whether the order was still valid and had been told by his superiors in Berlin that it was. He had instituted a system of investigation and had applied the order not to persons engaged in war-like operations such as the interruption of railways but only to persons who were shown to have co-operated with the Maquis.

After enquiries had been made by one, Kommandoführer Ernst, he had decided that the order must be applied to the victims of the killings charged in the present trial. Ernst had said that the group of prisoners had had sabotage equipment and instructions on demolition, some had been spies, and the activities of the group had been carried out in collaboration with the Maquis or the French civil population. The witness admitted, however, that there had been no trial of the victims by any court.

All the accused except Muth were found guilty. Subject to confirmation by superior military authority, Buck, Nussberger, Ostertag, Ulrich and Neuschwanger were sentenced to death by shooting, and Zimmermann, Dinkel, Wunsch, Korb and Vetter to imprisonment for ten, eight, four, three and two years respectively.

These sentences were confirmed by superior military authority.

## B. NOTES ON THE CASE

### 1. THE COMPOSITION OF THE COURT

The Court was a British Military Court convened under the Royal Warrant of 14th June, 1945, Army Order 81/1945, as amended.(1) It consisted of a President and five members including Capitaine P. Bellet of the French Air Force. The appointment of a French officer as a member of the Court was no doubt made in view of the fact that Frenchmen figured among the victims of the alleged crimes, and constituted an application of Regulation 5 of the Royal Warrant, which provides :

> " . . . Notwithstanding anything in these Regulations the Convening Officer may, in a case where he considers it desirable so to do, appoint as a member of the Court, but not as President, one or more officers of an Allied Force serving under his command or placed at his disposal for the purpose, provided that the number of such officers so appointed shall not comprise more than half the members of the Court, excluding the President."

### 2. THE STATUS OF THE VICTIMS

The Judge Advocate pointed out that the British and United States victims, if shown to be prisoners of war, were protected by the Geneva Prisoners of War Convention of 1929, in Article 2.(2)

(1) For the British law governing the trial of war criminals, see Vol. I of this series, pp. 105-110.
(2) See p. 49.

The French nationals, though not prisoners of war, were also protected by the laws and usages of war, and, said the Judge Advocate : " the position under international law is that it is contrary to the rules of international law to murder a prisoner, and, if this court took the view that the shooting of these four French nationals was a murder of a prisoner held by the Germans and under the control of these accused, the court would be entitled to convict these accused of the violation of the rules of international law."

Such discussions as arose during the trial regarding the legal position of the victims centred on the status of the six members of the Special Air Service Regiment. The Defence emphasised the evidence which tended to show that members of this Regiment had had some connection with the Maquis.

Though all accused but one were found guilty on the charge; no special finding being arrived at, it is impossible to ascertain in detail what view the Court took of the killing of the six British victims in particular. The Judge Advocate said that the Court might take the view that all that the evidence regarding the relations between the Special Air Service and the Maquis showed was that any two movements which took place in war at the same time must have an effect upon one another. Even if it had been proved that part of the Regiment were assisting the Maquis, it remained to be shown that the British and American prisoners were among those who took part in rendering such aid.

### 3. THE DEFENCE OF SUPERIOR ORDERS (1)

The Defence pleaded that all of the accused acted under superior orders. Counsel drew the Court's attention to the so-called Leader Order of the 18th October, 1942.(2) This, he claimed, bound all the German armed forces, including the S.S., S.D. and police, not to treat as prisoners of war, but instead to shoot, " members of so-called Commando detachments who were parachuted from the air behind the German lines to do acts of sabotage and interference." Every leader of a Kommando and officer had been made responsible for seeing that this order was carried out and was to be punished if he failed.

Counsel claimed that there was evidence that the victims of the shooting had established such contact with Terrorists and the Maquis as would bring them within the scope of these orders, and that a " security police case " preceded the executions. The accused would themselves have been punished " by the S.S. and S.D. Courts " had they not carried out their orders regarding the prisoners. Counsel for various individual accused claimed that the punishment meted out would undoubtedly have been death.

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(1) Regarding the plea of superior orders, see p. 13.

(2) Regarding this, the Führerbefehl of 18th October, 1942, see also the *Dostler Case*, in Vol. I of these Reports, pp. 28-29 and 33-34. It is interesting to note, from the point of view of historical research, that there are certain differences between the account of the contents of the Führerbefehl put forward in the *Dostler Case* and that put forward in the present trial by Dr. Isselhorst, for instance as regards the Allied personnel intended to be effected by it.

The Judge Advocate stated that in principle superior orders provided no defence to a criminal charge, and made reference to that passage from Oppenheim-Lauterpacht's *International Law*, 6th Edition revised, pp. 452-453, on which reliance has been placed so frequently in war crime trials :

> " The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime ; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. . . . Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received ; that rules of warfare are often controversial ; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime. . . . However, subject to these qualifications, the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity. . . ."

The Judge Advocate expressed the view that an accused would be guilty if he committed a war crime in pursuance of an order, first if the order was *obviously unlawful*, secondly if the accused *knew that the order was unlawful*, or thirdly if he *ought to have known it to be unlawful had he considered the circumstances in which it was given*.(1)

4. THE DEFENCE OF MISTAKE OF FACT

Counsel acting for the accused in general pointed out that in Germany there had been not only courts-martial but also " so-called S.S. and police courts for German persons and members of the S.S." He claimed that the interrogations of the victims by Kommandoführer Ernst, on whose reports Dr. Isselhorst acted, constituted a trial by the Security Police. The accused he claimed, had had no other information on the matter than that the prisoners had been tried and condemened, and had acted on that assumption. They had " neither the sense for technicalities nor the mental abilities to look deeper into this case." The Prosecutor, on the other hand, submitted that the obliteration of all traces of the crime and the steps taken by the accused to suppress all knowledge of the crime belied any contention that they thought that they were performing a legal execution. Lawful executions did not take place in woods, nor were those shot buried in bomb craters with their valuables, clothing and identity markings removed.

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(1) See p. 16.

The Judge Advocate pointed out that under the Hague Convention even spies were entitled to a trial.(1) There seemed to him to be no evidence that the victims were ever tried before a Court. Dr. Isselhorst had said that they were sentenced by decision of Ernst and " not through a court." If his evidence was believed, they were condemned as a result of an administrative decision and not after a trial.

Assuming that co-operation between certain of the victims and the Maquis was not contrary to the laws and usages of war and assuming that the original Führerbefehl was contrary to international law, the question whether or not the deceased had ever been subjected to trial to find whether they came within the scope of the latter would hardly seem relevant to the question of the legality of the executions. On the other hand, could it have been shown that a *bona fide* impression had existed in the minds of the accused that the execution was the consequence of a trial in which the victims had been legally condemned to death, the plea of mistake of fact, which the Defence raised, might well have been effective. In the circumstances of the case, however, the Court did not see fit to give effect to it.

### 5. IGNORANCE OF THE PROVISIONS OF INTERNATIONAL LAW AND ITS POSSIBLE EFFECTS

It is a rule of English law that ignorance of the law is no excuse : *Ignorantia juris neminem excusat*. There are some indications that this principle when applied to the provisions of international law is not regarded universally as being in all cases strictly enforceable. Thus Oppenheim-Lauterpacht, *International Law*, 6th Edition revised, pp. 452-453, states that " a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact . . . that [a member of the armed forces] cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received." In the present trial, the Judge Advocate, in his summing up, said that the Court must ask itself : " What did each of these accused know about the rights of a prisoner of war ? That is a matter of fact upon which the Court has to make up its mind. The Court may well think that these men are not lawyers : they may not have heard either of the Hague Convention or the Geneva Convention ; they may not have seen any book of military law upon the subject ; but the Court has to consider whether men who are serving either as soldiers or in proximity to soldiers know as a matter of the general facts of military life whether a prisoner of war has certain rights and whether one of those rights is not, when captured, to security for his person. *It is a question of fact for you.*"(2)

(1) Article 30 of the Hague Convention No. IV of 1907 : " A spy taken in the act shall not be punished without previous trial."

(2) Italics inserted.

## CASE No. 30.

# TRIAL OF
# KARL ADAM GOLKEL AND THIRTEEN OTHERS

BRITISH MILITARY COURT, WUPPERTAL, GERMANY
15TH-21ST MAY, 1946

## A. OUTLINE OF THE PROCEEDINGS

The accused, Karl Adam Golkel, Hans Hubner, August Geiger, Karl Bott, Heinrich Klein, Hans Limberg, Josef Pilz, Emil Pahl, Walter Jantzen, Walter Schmidt, Heinrich Thilker, Georg Zahringer, Ludwig Koch and Horst Gaede, were charged with committing a war crime in that they " at La Grande Fosse, France, on 15th October, 1944, in violation of the laws and usages of war, were concerned in the killing of " eight named members of No. 2 Special Air Service Regiment, a British unit, when prisoners of war. They pleaded not guilty.

It was shown that the victims, were captured British parachutists who, after being interrogated and kept imprisoned for several days, at the headquarters of the Kommando Ernst at Saales, were taken to a wood and shot. All of the accused were under the command of Sturmbannführer Ernst, on whose orders the executions were carried out. None of the accused were proved to have taken part in the actual shooting, but one of the Prosecution's witnesses, the former secretary of Ernst's Kommando, testified that Geiger, Koch, Gaede and Hubner took part in the " less important interrogations " of prisoners at Saales.

Golkel was a captain and the only accused who had at the time of the offence held a commissioned rank. Despite this fact, he claimed that a certain Oppelt had been put in charge of the executions by Ernst and that he himself had to be present only as a formality as he was an S.S. officer. He admitted having previously sought and found out a suitable site for a grave for the victims. On the day of the shooting he was driven to the scene by Klein and claimed only to have arrived near the completion of the offence ; on the exact time of his arrival, however, the other evidence was conflicting, and Zahringer went so far as to state that Golkel ordered that the prisoners should be made to undress and that he indicated where they were to be shot. After the execution Golkel reported its completion to Ernst, but he claimed in Court that he did so only to show Ernst that he had been present as ordered.

Koch, a corporal, admitted that he was one of the guards on the lorry which conveyed the victims to the wood and that he and Hubner led one of them to the prepared grave. He claimed, however, that, on being ordered by Oppelt to shoot, both he and Hubner refused to do so.

Hubner, another corporal, was also a guard on the lorry. He said that Oppelt had ordered himself and Koch to shoot a prisoner and that both refused, his own objection being that he had not been ordered to be present as one of the executioners.

Zahringer, a corporal, drove the lorry ; according to Golkel, he also accompanied the latter when he went to choose the site for the shooting. Zahringer's account of his part on the day of the execution was that he stayed by his lorry until the last prisoner left it, and that he followed this one into the wood and saw him shot.

Geiger, a corporal, admitted that he was present at the interrogation of one of the victims, and also that he helped in widening the ditch intended to receive the bodies of the prisoners. His claim to have spent the whole of the time of the shooting in preventing all traffic and persons from approaching the scene was corroborated by Hubner and Koch.

Klein, a corporal, said that he was ordered by Ernst to drive Golkel to the wood and that he did so, stopping on the way but later catching up with the lorry again. At the scene of the shooting his duty was merely to act as a guard and assist in filling in the grave. Koch asserted that Klein was present for the purpose of shooting prisoners but, under cross-examination, he admitted that he did not actually see this fellow-accused kill any prisoners.

Jantzen was a staff-sergeant and, according to the Kommando secretary mentioned above, he conducted some of the " more important " interrogations of prisoners ; the accused admitted that he took a minor part in the questioning of the eight English parachutists who were later shot. Golkel said that Jantzen was Ernst's right-hand man and was much influenced in his decisions by his advice. Hubner's evidence was that Jantzen was in the unit office when Ernst gave the order for the shooting, and that he thought that Jantzen was also present in the wood. Klein in a pre-trial statement, said that Jantzen got into the back of Golkel's car and was among those around the lorry at the wood, but in Court he said : " It was also a mistake when I quoted Jantzen as being present in the wood."

Gaede was a driver. In his statement made before trial he said that he was told by Golkel to get a car ready in order that the latter might find a suitable spot for the execution. He did take Golkel on this mission and he claimed that he expressed his concern to Golkel about the proposed shootings. In the witness box he testified that he drove Oppelt and one Dietrich to the scene of the shooting on the day thereof and then obeyed an order by Oppelt to park the car and stay on the road. Geiger, however, said that Gaede helped to widen and deepen the grave, and Zahringer and Koch said that the same accused conducted one of the prisoners to the place of shooting.

The only evidence against Schmidt, who was Ernst's batman, was that of Klein, who said : " I am not sure if Schmidt was around the lorry, but I know he was ordered to be present." Schmidt's denial of this evidence was corroborated by Golkel and Geirger.

In pre-trial statements the accused Klein, Golkel, Hubner and Geiger gave evidence incriminating Pahl, Pilz, Limberg, Thilker and Bott, but in Court they wholly or in large part withdrew this testimony. A certain amount of evidence was also called by the Defence on behalf of these accused.

Bott, Limberg, Pilz, Pahl, Schmidt and Thilker were found not guilty.

Golkel, Klein, Gaede, Hubner, Geiger, Jantzen, Koch and Zahringer were found guilty, and sentenced to the following terms of imprisonment: Golkel ten years, Klein and Gaede eight years, Hubner, Geiger and Jantzen four years, Koch three years, and Zahringer two years.

These sentences were all confirmed by higher military authority with the exception of that passed on Jantzen ; this accused was later sentenced to death in another trial concerning other war criminals, and this last sentence was confirmed.

## B. NOTES ON THE CASE

### 1. THE RELATIVE VALUE AS EVIDENCE OF PRE-TRIAL STATEMENTS

It may fairly be said that five accused, Pahl, Pilz, Limberg, Thilker and Bott, were found not guilty as a direct result of the fact that Klein, Golkel, Hubner and Geiger withdrew in Court wholly or in large part the evidence which they had given in pre-trial statements. There were also less sensational but similar recantations of evidence relating to others among the accused. These circumstances gave rise to some discussion as to the relative value as evidence of pre-trial statements produced in Court in documentary form and of oral testimony delivered in the witness box.

For the Defence it was argued that the oral evidence before the Court was the more reliable ; the previous statements were often in error though not through deceit. Mistakes were due to the circumstances in which they were made. It was said that: " It is obvious that when the accused were questioned after their arrest they were in a state of great excitement ; unprepared, they were taken out of their civil life and were confronted with facts and questions for which they were not prepared in any way. Names were read out to them too in connection with the question of whether the persons mentioned had participated in any actions. This might easily have caused confusion ; the general excitement also helped. In the meantime the accused had the opportunity to let these incidents pass through their minds in peace and to think everything over. This has clarified the picture. I think that the fact of the later discussion amongst the accused has contributed less to the clarification of the picture than the cold reflection on the part of the accused themselves."

The Prosecutor, on the other hand, submitted that the statements should be accepted as true, whether the retractions were due to untruth or confusion.

In his summing up, the experienced Judge Advocate made some valuable comments on the relative value of different kinds of evidence and on the way in which evidence should be judged. His words were as follows:

> " There is no method of placing evidence in rigid categories and saying that one category must be believed rather more than another category. You should consider each piece of evidence and consider its source, and then decide for yourselves what weight you think should

be attached to that source. It is usual to say that evidence given in the witness box on oath is likely to receive more weight than a statement made not on oath and not subject to cross-examination. In this particular case each of the statements which were made by the accused out of court were made in fact on oath ; so that in each case if you are going to compare the statements they made in the witness box with the statement they made before the trial, in each case what they said was on oath, and the only difference is that in one case they knew that afterwards they might be open to cross-examination.

" You have to consider the relative value which you attach to the statement made on oath before Court and the statement made here in Court in the light of all the circumstances. You are entitled to consider, and should consider, the circumstances in which the original statement was made—apparently made before contact with any other accused, before knowing who was going to be accused, the defence would say, and before perhaps they had turned the matter over in their minds, at any rate as much as they had by the time they came to court.

" When you consider the evidence that they gave in court you are entitled to bear in mind that all of them have been in contact with each other for a certain length of time, and the vast majority of them for quite a long time. We have had that put in the evidence, and that there was therefore an opportunity for consultation and discussion as to what actually did take place. It is a matter for you to decide what influence you think that has had on the evidence they have given. It might be argued on one side that that meant that any errors that were discovered were corrected ; on the other side it might be argued that there had been opportunity to discuss what it was best to say.

" Those are general considerations for you to consider when you consider the weight to be attached to each source of evidence which you take into account. Look in each case at the source ; look first and foremost at the man who makes the statement, and make up your minds what you think of him—whether you think he is honest, whether you think he is dishonest, whether you think he is accurate, or merely inaccurate just because he has got a faulty memory, or because he was not really in a good position to see what was happening, whereas another man may have been in a very good position to see what was happening. I think the point made by one of the defence counsel was that the driver of the lorry was at a vital spot, he ought to have seen exactly which persons were there and which persons were not. Take all these matters into consideration when you consider the value which you think it right to place on each piece of evidence which is given before you.

" I would only add on this matter one thing. Each accused has gone into the box. He was not compelled to go into the box ; he did so entirely voluntarily. Sometimes one is apt to say, or tempted to say : ' Well, he is the accused person. You cannot really place much reliance upon what he says.' That would be an entirely wrong attitude in which to approach his evidence. Consider him just as any other witness in the box ; weigh him up, weigh up whether you think he is

honest or not, whether you think he is accurate or not, and matters of that kind, and let only one of your considerations be that he is the accused person. Weigh him up just as you would weigh up any other witness to see if you think you can rely upon what he tells you."

At a later point, the Judge Advocate stressed again : " There is no rule that evidence given in the witness box must be given more weight than evidence, statements, taken on oath outside the Court. As I said earlier, take into account all the circumstances. . . ."

2. QUESTIONS OF SUBSTANTIVE LAW

The facts of the present case resemble in various ways those of the *Trial of Karl Buck and Ten Others*(1) and of the *Trial of Werner Rohde and Eight Others*,(2) particularly the former.

In both the former of these cases and the present one, the offence consisted in taking prisoners of war to a wood and shooting them without legal justification. As the Judge Advocate stated in his summing up in the present trial, such acts were in violation of Articles 2 and 3 of the Geneva Prisoners of War Convention of 1929. These provisions run as follows :

" Art. 2. Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.

" They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.

" Measures of reprisal against them are forbidden."

" Art. 3. Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex.

" Prisoners retain their full civil capacity."

The victims, like a number of those whose killing was alleged in the *Trial of Karl Buck and Ten Others*, were members of the Special Air Service, and the defence pleaded was similar to the one put forward in that case ; it was claimed on behalf of all of the accused that they acted under superior orders, that they believed that the victims had been tried and condemned to death for acting in support of the Maquis, and that the accused were not in a position to find out whether the shooting was illegal and had not the knowledge of International Law necessary to judge for themselves.

(i) *The Defence of Superior Orders*(3)

Although Dr. Isselhorst, here a Prosecution witness, was cross-examined by Defence Counsel regarding the Führerbefehl of 18th October, 1942, (4)

(1) See pp. 39-44.
(2) See pp. 54-9.
(3) As to the defence of superior orders see also p. 13.
(4) See p. 42, footnote 2.

few references were made to it in the speeches for the Defence, where it was simply claimed that, in so far as any of the accused could be shown to have been concerned in the killings alleged, they were acting under superior orders in performing the acts concerned.

Counsel acting on behalf of all the accused quoted the following passage from paragraph 60 of Chapter VIII (*The Courts of Law in Relation to Officers and Courts-Martial*) of the British *Manual of Military Law* :

> " . . . How far a subordinate could plead the specific commands of a superior officer—such commands being not obviously improper or contrary to law—as justifying an injury inflicted on a civilian, is somewhat doubtful. In most cases the fact of the orders having been given would no doubt prove the innocent intent of the subordinate, and lead in practice to his acquittal on a criminal charge."

Counsel claimed that the same applied in the present instance, and went on to quote from paragraph 443 of Chapter XIV of the *Manual* the following words : " Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. . . ."

The provisions of German Military Law in force at the time of the deed were, according to Counsel, even more favourable to the accused. According to German law, the soldier would only escape punishment on disobeying an order if he knew of its illegality ; it was not enough to show that he was in a position to suppose its illegality. If he carried out the order, he could only be punished if he exceeded his instructions or if he knew that they entailed a breach of criminal or military law. Such references to German law, said Counsel, were made relevent by a principle of International Law that a soldier could not be punished for an action which the law of his country compelled him to do. He added that International Law recognized that subordinates were not compelled to probe into the legality of an order. Only if an order was obviously unlawful was it wrong for the soldier to follow the order. Counsel claimed that the orders binding the accused were more precise than those given to the persons found guilty in the " *Llandovery Castle* " Case ; [1] none of the present accused could have referred to the decision in this case of the German Supreme Court, in the event of disobedience on their part ; and in any case, German courts were not bound by precedent.

Counsel admitted that Koch had in fact refused to obey the order of Oppelt that he should take part in the shooting, but he pointed out that these two accused were both N.C.O.'s and claimed that the order was, therefore, not binding.

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[1] *Annual Digest of Public International Law Cases*, 1923-24, Case No. 235 ; British Command Paper (1921) Cmd. p. 45. In that case, two officers of the crew of a German U-Boat were found guilty of firing at survivors from a sunken hospital ship, despite the fact that they were acting on order from the U-Boat Commander.

In his summing up the Judge Advocate made reference to the well-known passage from Oppenheim-Lauterpacht, International Law, 6th Edition revised, pp. 452-453, which is reproduced in paragraph 443 of Chapter XIV of the *Manual of Military Law*.(1) It was no defence to plead superior orders when these were *obviously unlawful*, as they were in the " *Llandovery Castle* " *Case*. Nor did the defence hold good if an accused either *knew that the orders were unlawful or must be deemed from the surrounding circumstances to have known that they were unlawful*.(2)

*(ii) The Remaining Defence Arguments*

The Defence did not claim that in fact a trial of the victims had been held ; the plea put forward was that both Isselhorst and Ernst were lawyers and the accused had to assume that the order which they received was justified. The latter were not able to judge scrupulously the legality of their orders but could only ask themselves whether these orders could be legal. In this connection Counsel claimed that the accused all knew of the leader order which Isselhorst had mentioned. The accused knew that there was some connection between the parachutists and the Maquis, which were operating in the district, and it was therefore reasonable for them to assume that the actions of the parachutists were illegal since the Maquis movement itself was, according to the Defence, a violation of International Law. As the latter constituted an example of civilian intervention into warfare and did not fall within the scope of Articles 1 and 2 of the Hague Convention No. IV of 1907, it was contrary to International Law, and it was therefore not necessary for the Defence to touch on the question whether the armistice between Germany and France made the Maquis movement an illegal one.

Articles 1 and 2 of the Hague Convention, to which the Defence referred, provide as follows :

> " Art. 1. The laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions :—
>
> (1) They must be commanded by a person responsible for his subordinates ;
>
> (2) They must have a fixed distinctive sign recognizable at a distance ;
>
> (3) They must carry arms openly ; and
>
> (4) They must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination " army."

> " Art. 2. The inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly, and if they respect the laws and customs of war."

(1) See pp. 14-15.
(2) See p. 16.

The Prosecutor regarded paragraph 37 of Chapter XIV of the British *Manual of Military Law* as a correct and relevant statement of International Law:

> " It is not, however, for officers or soldiers in determining their conduct towards a disarmed enemy to occupy themselves with his qualifications as a belligerent. Whether he belongs to the regular army or to an irregular corps, is an inhabitant or a deserter, their duty is the same: they are responsible for his person and must leave the decision of his fate to competent authority. No law authorizes them to have him shot without trial, and international law forbids summary execution absolutely. If his character as a member of the armed forces is contested he should be sent before a Court for examination of the question."

He claimed that further paragraphs of Chapter XIV corresponded to the provisions of the Geneva Prisoners of War Convention, 1929, regarding the trial of prisoners, were binding on the authorities holding the captives whose execution was alleged. The relevant passages of the Geneva Convention are contained in Articles 60-67. Article 60 states: " At the commencement of a judicial hearing against a prisoner of war, the detaining Power shall notify the representative of the protecting Power as soon as possible, and in any case before the date fixed for the opening of the hearing. . . ." Article 62 gives an accused prisoner the right to be assisted by a qualified advocate of his own choice. Article 66 provides that: " If sentence of death is passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence shall be addressed as soon as possible to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served. The sentence shall not be carried out before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power."

The Judge Advocate said that there was evidence, not of any trial, but only of a decision taken by Dr. Ernst, possibly in consultation with Dr. Isselhorst. He agreed with the view that, even if the victims had been carrying on operations in breach of International Law, it was not lawful to execute them without trial.

The Prosecutor said that there was ample evidence that the victims were in uniform when captured, and, in support of his claim that their activities were legal, he quoted paragraph 45 of Chapter XIV of the *Manual:* " Train wrecking, and setting on fire camps or military depots are legitimate means of injuring the enemy when carried out by members of the armed forces." He submitted that the activities of the British troops involved were covered by these terms. As the Judge Advocate reminded the Court, however, the Defence claimed, not that the activities of the parachutists were actually illegal but only that it was reasonable in the circumstances for the accused to regard them as illegal. The Judge Advocate concluded that it would be possible for the Court to proceed on the assumption that the victims were entitled to the protection of the Geneva Prisoners of War Convention.

*(iii) The Scope of the Words " Concerned in the Killing "*

The trial is also of legal interest in that it illustrates the various courses of action which have been held to make an accused guilty of the war crime of being " concerned in the killing " of prisoners of war. On this wording the Judge Advocate, in his summing up, made the following comment :

> " It is for the members of the Court to decide what participation is fairly within the meaning of those words. But it is quite clear that those words do not mean that a man actually had to be present at the site of the shooting ; a man would be concerned in the shooting if he was 50 miles away if he had ordered it and had taken the executive steps to set the shooting in motion. You must consider not only physical acts done at the scene of the shooting, but whether a particular accused ordered it or took any part in organizing it, even if he was not present at the wood."

## CASE No. 31.

## TRIAL OF WERNER ROHDE AND EIGHT OTHERS

BRITISH MILITARY COURT, WUPPERTAL, GERMANY,
29TH MAY–1ST JUNE, 1946

### A. OUTLINE OF THE PROCEEDINGS

Wolfgang Zeuss, Magnus Wochner, Emil Meier, Peter Straub, Fritz Hartjenstein, Franz Berg, Werner Rohde, Emil Bruttel, and Kurt Aus Dem Bruch, were charged with committing a war crime in that they at Stuthof/Natzweiler, France, in or about the months of July and August, 1944, in violation of the laws and usages of war, were concerned in the killing of four British women when prisoners in the hands of the Germans.

The accused were all officials attached to Stuthof/Natzweiler camp, except Berg, who was a prisoner there. It was shown that two members of the Womens Auxiliary Air Force (W.A.A.F.) and two of the First Aid Nursing Yeomanry (F.A.N.Y.), British Units, one of the four being of French nationality, had been sent to France in plain clothes to assist British liaison officers whose mission was to establish communications between London and the Resistance Movement in France. They were captured and eventually taken to Karlsruhe prison. After some weeks they were delivered to Natzweiler camp, where they were injected with a lethal drug and then cremated. It was alleged that the circumstances of their death constituted a war crime for which the accused were in different ways responsible. Counsel for Meier and Aus Dem Bruch were told by the Judge Advocate that they need not deal with these two accused in their final addresses, and the two were found not guilty.

Hartjenstein was Kommandant of the camp. There was no definite evidence that he was present at the killing, and he claimed that he was away from the camp at the time and that he did not know of the events alleged until after capture. It was established, however, that he was present at a party in the camp, the date of which was, according to some evidence, the same as that of the killings.

Wochner was the head of the political department at the camp, being independent of Hartjenstein and directly under the orders of the Security Police in Berlin. He claimed that someone from the criminal department at Karlsruhe brought the four women to his office, saying that they were to be executed and that he sent them away, saying that the matter did not concern him. He also denied having had any knowledge of the actual killings until after his capture. There was no evidence that he was present at the killings, but one witness said that Straub could not perform a cremation without Wochner's authority.

Rohde was a medical officer at the camp and admitted giving at least one injection, intending to kill. He claimed, however, that he only performed

this distasteful task because he had orders to do so from one Otto ; the latter, however, was shown to be merely an officer under a course of instruction with no official authority in the camp.

Rohde admitted that Otto showed him no evidence of a sentence of death having been passed on the victims.

Straub was in charge of the camp crematorium, but claimed that he was in Berlin at the time of the offence ; on this point, however, there was a conflict of evidence, and one witness stated that Straub had actually told him that he was present at the executions.

Against Zeuss, a staff sergeant at Natzweiler, the evidence consisted of an affidavit statement, that he, along with Straub, had been seen " taking prisoners backwards and forwards," and the evidence of Wochner, that Zeuss was usually present at executions. Zeuss claimed that he was on leave at the time of the killings, and in this he was to some extent supported by the other accused.

Berg was a prisoner whose task was to work the oven of the crematorium. He admitted that he lit the oven on the occasion but without knowing that there was anything unusual in the circumstances. No one claimed that he took part in the execution, and his own account was that he was locked in his room and that a fellow-prisoner watched and related the events to him as they happened.

Bruttel, a first aid N.C.O. at Natzweiler, admitted that he obeyed an order to bring the drug and that he heard, in conversations between the doctors and other officers in the camp, references to " the four women spies," " we cannot escape the order " and " execution." He claimed, however, that he had no clear idea that an execution was intended when he received his order. He was outside the room where the executions took place ; he would have preferred to leave the crematorium altogether but could not do so without a lamp.

It was not shown that there existed any warrant for the execution of the victims. There was evidence that the papers relating to three of them during their stay in Karlsruhe prison provided no record of a trial or a sentence of death.

Zeuss, Meirer and Aus Dem Bruch were found not guilty. The remaining accused were found guilty ; Rohde was sentenced to death by hanging, Hartjenstein to imprisonment for life, and Straub, Wochner, Berg and Bruttel to imprisonment for thirteen, ten, five and four years respectively.

The findings and sentences were confirmed, and put into execution.

## B. NOTES ON THE CASE

### 1. THE OFFENCE ALLEGED

The charge alleged a killing, contrary to the laws and usages of war, of British women when prisoners in German hands. Neither the Prosecutor

nor the Judge Advocate attempted to argue on the basis of the Geneva Prisoners of War Convention, however, and the only references to conventional International Law were made to Articles 29 and 30 of the Hague Convention.(1) The lack of greater clarity in the allegation would seem to have arisen out of the prevailing doubts as to the legal status of the victims (see under the next heading). In discussing the plea of superior orders, the Judge Advocate stated: " You begin, of course . . . from the point of view that *the laws of humanity* demand that no-one shall be put to death by a fellow human being . . ."

Regarding the meaning of the term, " concerned in the killing," contained in the charge, the Judge Advocate explained that to be concerned in a killing it was not necessary that any person should actually have been present. None of the accused was actually charged with killing any of the women concerned. If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with the knowledge that that other man was going to put the killing into effect then he was just as guilty as the person who fired the shot or delivered the blow.

## 2. THE PLEA THAT THE KILLING WAS LEGAL UNDER ARTICLES 29 AND 30 OF THE HAGUE CONVENTION

Articles 29 and 30 of the Regulations annexed to the IVth Hague Convention of 1907 read as follows:

> " Art. 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.
>
> " Accordingly soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army for the purpose of obtaining information are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians entrusted with the delivery of despatches intended either for their own army or for the enemy's army, and carrying out their mission openly. To this class likewise belong persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.
>
> " Art. 30. A spy taken in the act shall not be punished without previous trial."

One of the Defence Counsel, acting on behalf of all the accused in this instance, argued that the evidence had shown that the four victims were spies and that Article 30 had been fulfilled. A spy was one who secretly or under false pretext received or attempted to receive messages in the country occupied by the enemy. The victims had landed in France without

(1) See below.

uniforms and had contacted the Resistance Movement. Article 30 simply stated that a sentence must have preceded the execution, but nowhere was it explained how such a sentence should have been arrived at. Counsel quoted the opinion of Professor Mosler, that: " Treatment according to usages of war does not require the lawful guarantee of a proper trial. It is sufficient to ascertain that a war criminal offence has been committed . . . Usages of war do not know of any regulations on who could pass the sentence. Normally the commanding officer of the troops who brought about the arrest would be the one to ascertain the guilt, the punishment, and the execution, and would order the execution." It must be remembered that the Nazi regime used unusual methods in some of its activities. Counsel for the Prosecution had alleged that the documents of the prison showed that no legal proceedings had taken place because nothing was mentioned in those documents concerning a sentence. The sentence was only entered on such documents, however, when the institutions concerned also carries out the execution, so that they could know how many days the party concerned was confined. In the case of political crimes where usually the Gestapo dealt with the matter the prison was given no such instruction. Counsel stated: " For us Germans the government in the last years have given us an enormous number of special courts amongst which I myself have found S.S. courts, S.D. courts, courts who everywhere decided the fate of a human being and normally passed sentences of death . . . Quite a number of the accused in as much as they are only small men cannot be expected to know that perhaps there was no sentence, and finally it is my point of view that the sentence by a full court was not required in this case but a sentence by a single person may have sufficed." (1)

International Law, it was argued, did not lay down the manner in which spies should be executed, and instantaneous painless death by injection could be considered a humane method. Counsel suggested that a soldier might have found difficulty in shooting or hanging women.

In reply to these arguments, the Prosecutor admitted that, while the victims' mission was not connected with espionage, they might nevertheless, on the least favourable interpretation, be possibly classified as spies. Had they had a trial by a competent court and subsequently been lawfully executed by shooting this case would never have been brought. The Defence, however, had not shown that there was any trial. No death sentence was ever communicated to these women nor did they ever, in the Prosecution's submission, appear before any court. Someone in authority issued orders for all inmates to be indoors between eight and nine during the evening. The victims were injected with secrecy and at the same time they

(1) Similarly in the Trial of Karl Buck and ten others (see p. 39), the Defence argued that, in order to do justice to the accused, the Court must " return to the conception of justice as it was prevalent at that time." In Germany there were in operation, not only courts-martial, but also " so-called S.S. and police courts for German persons and members of the S.S." He claimed that the evidence of Dr. Isselhorst had proved that the accused had not " shot the victims out of spite," but that a " security police trial " preceded the shooting; the same witness had shown that " the first basic fact of a trial was there; that means that the accused were given a hearing. The shot persons were questioned and their statements were taken down in writing." As a result of such examinations, Ernst had come to his decision.

were told they were being injected against typhus. They were then immediately cremated. Could the secrecy and the circumstances of their killing be reasonable inferred to be in the interests of humanity ? (1)

In his summing up, the Judge Advocate began by pointing out that a person who takes part in a judicial execution bears, of course, no criminal responsibility. There was no real definition of a spy, but Article 29 gave several examples of persons who could not be regarded as such. The Court might chose to interpret the reference to " persons sent in balloons for the purpose of carrying despatches and generally, of maintaining communications between the different parts of an army or a territory " as including within its scope persons sent by aircraft for the purpose of maintaining communications. If the victims had been obviously spies, their being such might have been a mitigating circumstance which the accused could possibly plead, but the doubt which existed on the point made it all the more clear that they should have been given a trial. The law on the point was set out in paragraph 37 (Duty of officers as regards legal status of combatants) of Chapter XIV of the *Manual of Military Law*.(2) The Judge Advocate, after reviewing the evidence on the point, concluded that he could see no proof that a trial in any real sense was held. A separate issue was whether or not the accused actually regarded the execution as being a judicial one ; the Judge Advocate thought it legally sound to plead that the accused did so, if it could be proved in fact.

### 3. THE PLEA OF SUPERIOR ORDERS

On behalf of the accused, it was pleaded that German Military Law demanded than an order had to be carried out unless the accused knew positively that the deed was unlawful. The Judge Advocate pointed out that, even if an order had been given, no one was obliged to obey an unlawful order. The Defence, he continued, had argued in effect that in Germany at the time an order to kill someone in the circumstances of this case would not be regarded as unlawful. He felt bound, however, to advise the Court that this did not provide a sufficient answer, if they were " satisfied that the order was one which could not have been tolerated in any place where a system of justice was used," and made the following comment : " If you were to go to a lunatic asylum to visit a field-marshal who was an inmate there and he said : ' Go and kill the head warder,' you would not, I imagine, go and do so and say : ' Well, I had to as the field-marshal said " do it." ' That would not be an answer. That is what you are up against in this particular trial ; a question of whether if anyone gives an order, emanating even from the highest authority, which *obviously cannot be permitted*, you are going to obey it or not." (3) (Italics inserted).

### 4. EVIDENCE BY ACCOMPLICES

In summing up, the Judge Advocate pointed out that, in this case, a great deal of the evidence was provided by accomplices " that is, persons

(1) Similarly, in the Trial of Karl Buck and ten others, the Prosecutor pointed out that the circumstances of the killings made it unlikely that the accused thought that they were performing lawful executions ; see p. 43.
(2) See p. 52.
(3) See p. 16.

who are also charged, or obviously could be charged, with having taken part in the same offence." He warned the Court " that the evidence of an accomplice must be regarded always with the greatest suspicion. Every accomplice is giving evidence which is of a tainted nature. He may have many reasons for not telling the truth himself. He may be trying to exculpate himself and throw the blame on somebody else, and there may be a hundred and one reasons why he should not be telling the truth . . . This does not mean that you cannot believe him or you cannot accept the evidence of an accomplice, but it means that before you do so you must first caution yourselves on those lines. If, having done so and in spite of having so warned yourselves, you believe that what he is saying is true, you are perfectly free to act upon his evidence." He added : " When you are looking for corroboration of an accomplice's evidence one accomplice cannot corroborate another."

In making these remarks the Judge Advocate was applying to the case the practice followed in English Criminal Law, according to which, " where a witness was himself an accomplice in the very crime to which an indictment relates, it is the duty of the judge to caution the jury strongly as to the invariable danger of convicting upon such evidence without corroboration. Moreover this corroboration must confirm not merely a material particular of the witness's story, but some particular which connects the prisoner himself with it . . . Corroboration by another accomplice, or even by several accomplices, does not suffice . . . But these common-law rules as to the necessity of corroborating accomplices amount only to a caution and not to a command." (1)

(1) Kenny, *Outlines of Criminal Law*, 15th Edition, pp. 459-461.

## CASE No. 32.

# TRIAL OF LIEUTENANT GENERAL HARUKEI ISAYAMA AND SEVEN OTHERS

UNITED STATES MILITARY COMMISSION, SHANGHAI,
1ST–25TH JULY, 1946

## A. OUTLINE OF THE PROCEEDINGS

### 1. THE CHARGES

It was charged that the accused, Lieutenant-General Harukei Isayama, Colonel Seiichi Furukawa, Lieutenant-Colonel Naritaka Sugiura, Captain Yoshio Nakano, Captain Tadao Ito, Captain Masaharu Matsui, First-Lieutenant Jitsuo Date and First-Lieutenant Ken Fujikawa did each " at Taihoku, Formosa, wilfully, unlawfully and wrongfully, commit cruel, inhuman and brutal atrocities and other offences against certain American Prisoners of War, by permitting and participating in an illegal and false trial and unlawful killing of said prisoners of war, in violation of the laws and customs of war." The charges asserted that the offences of the first two accused were committed " on or between 14th April, 1945 and 19th June, 1945," and those of the others " on or between 21st May, 1945 and 19th June, 1945 " ; and that each of the accused except the first two mentioned above committed the offences charged " as a member of a Japanese Military Tribunal."

When taken together, the charge and accompanying Bill of Particulars, which specified the offences asserted that the accused Lieutenant-General Harukei Isayama did " permit, authorize and direct an illegal, unfair, unwarranted and false trial " before a Japanese Military Tribunal of certain American prisoners of war, did " unlawfully order and direct a Japanese Military Tribunal " to sentence to death these American prisoners of war, and did " unlawfully order, direct and authorize the illegal execution " of the American prisoners of war. The charge and accompanying Bill of Particulars against the accused, Colonel Seiichi Furukawa, were similar except as to those relating to the appointment and convening of the Japanese Military Tribunal. With respect to the accused Lieutenant-Colonel Naritaka Sugiura, Captain Yoshio Nakano, Captain Tadao Ito, Captain Masaharu Matsui, First-Lieutenant Jitsuo Date and First-Lieutenant Ken Fujikawa, the Charges and Bills of Particulars asserted that they as members of the Japanese Military Tribunals did " knowingly, wrongfully, unlawfully and falsely try, prosecute and adjudge certain charges " against the several American prisoners of war " upon false and fraudulent evidence and without affording said prisoners of war a fair hearing," did " knowingly, unlawfully and wilfully sentence " the several American prisoners of war to be put to death, resulting in their unlawful death. Several of the accused were further charged in their capacities as chief judge and prosecutors and those who acted as judges were further charged with the wrongful and wilful failure to perform their duties as such judges and with the failure and neglect to provide a fair and proper trial.

The accused pleaded not guilty.

## 2. THE EVIDENCE BEFORE THE COMMISSION

The evidence showed that fourteen United States airmen were captured by the Japanese Formosan Army and interrogated for alleged violations of the Formosa Military Law relating to the punishment of enemy airmen for acts of bombing and strafing in violation of International Law. These fourteen airmen were for the most part radiomen, photographers and gunners, and were captured between 12th October, 1944, on which the Military Law was issued, and 27th February, 1945. The senior members of the plane crews—the pilots and co-pilots—were sent to Tokyo for intelligence purposes and were not tried by the Japanese with their fellow crew-members.

The Law in question provided that its terms would apply to all enemy airmen within the jurisdiction of the 10th Area Army and that punishment would be meted out to all enemy airmen who carried out any of the following: bombing and strafing, with intent to kill, wound or intimidate civilians; bombing and strafing with intent to destroy or burn private objectives of non-military nature; bombing and strafing non-military objectives apart from unavoidable circumstances; disregarding human rights and carrying out inhuman acts; or entering into the jurisdiction with intentions of carrying out any of the foregoing. Death was provided as the punishment, but this, according to circumstances, could be changed to imprisonment for life or for not less than 10 years. The law stated that the punishment would be carried out by the appropriate commander; and provided for the establishment of a Military Tribunal at Taihoku composed of officers of the 10th Area Army and other units under its command, and for the applicability of the regulations of the special court-martial to the Military Tribunal. It was further provided that anyone violating this law would be tried by Military Tribunal; that the commander would be in charge of the Tribunal and that the Tribunal would be composed of three judges—two ordinary army officers and one judicial officer—to be appointed by the commander.

All of the fourteen were interrogated by members of the 10th Area Army Judicial Department. There was some evidence that, during the investigation, the chief of the Judicial Department, the accused Furukawa, inquired in Tokyo as to the disposition of the captured airmen, and that he was told that the fourteen should be tried if they came within the scope of the Military Law. On his return to Formosa he instructed his subordinates to complete the investigations. The evidence before the United States Military Commission disclosed that the records of the interrogations of several of the American airmen were falsified before the trial by the Japanese Court or before the Japanese Court records were completed.

The interpreter who was present when the falsified statements were taken testified that none of the airmen concerned made any admissions of indiscriminate bombing or strafing. This evidence was supported by the testimony of certain of those who had the task of recording the interrogations.

The accused denied the falsification and claimed that admissions of guilt had been made by the airmen.

It was the contention of the accused in the present trial that, in accordance with Japanese War Department directives, the 10th Area Army asked instructions of the Central Government during the pre-trial investigations and forwarded statements of opinion prior to referring the cases for trial. A reply came back from Tokyo stating that if the opinions given were correct, severe judgment should be meted out. The accused Isayama, Chief of Staff, 10th Area Army, was advised of all proceedings. During the absence of Furukawa from headquarters on a trip around Formosa, his assistant, Major Matsuo (1) sent the final reports of investigation to General Ando (1) and Ando ordered the trials of the American airmen and appointed the Military Tribunal.

The accused Sugiura was the chief judge on all cases ; Nakano was associate judge on all cases ; Date was the judicial judge on the trial of three airmen ; Matsui was the prosecutor in the case against two airmen, and the judicial judge in the cases against five other airmen ; Fujikawa was the judicial judge in the case of two airmen ; and Ito was the prosecutor in the trial of one airman and the judicial judge in the trial of another airman.

The fourteen Americans were tried in units according to the planes of which they were crew members. There were six cases, all brought to trial on 21st May, 1945. The American airmen were not afforded the opportunity to obtain evidence or witnesses on their own behalf. The defence attempted to justify this, first on the ground that lack of personnel and facilities made it impossible to permit the airmen to go to the scenes of their alleged indiscriminate bombings and strafings, and secondly on the ground that the airmen were given full opportunity in court to make whatever statements they wished. Some testimony was adduced by the prosecution in the United States trial to show that, except for the charges, no other document or evidence was interpreted to the airmen, and that they were not defended by counsel.

There was some evidence indicating that, under the Japanese system of military justice, an accused was not allowed defence counsel in time of war ; the evidence before a tribunal was largely documentary, based on admissions and statements of the accused in pre-trial interrogations and reports of damage and investigations by the gendarmerie ; and the accused might testify before the tribunal and might introduce evidence on his behalf. It was the contention of the defence that this was the procedure followed in each of the trials of the fourteen American airmen, and this procedure, it was testified, was the normal one.

It was the contention of the defence that since an intention on the part of the Japanese Prosecution to demand the death penalty had been approved

(1) Matsuo and Ando committed suicide before the date of the trial before the United States Commission.

by Tokyo, and since the death penalty had been demanded at the trials, the military tribunal had to adjudge death and the commander had to order its execution unless Tokyo ordered otherwise when advised of the results of the trials. The commander, Ando, issued an order for the execution of all fourteen after final instructions were received from Tokyo. On the morning of 19th June, 1945, the American fliers were lined up in front of an open ditch, shot to death and then buried in that ditch.

The Japanese records of trial relating to these American airmen, and which were turned over to American authorities in September 1945, were not completed until after the Japanese surrender, and were written up as directed by Furukawa. The accused did not sign the records of the trials until after the war.

The following paragraphs set out further details relating to each accused.

Isayama, a Lieutenant-General, as Chief of Staff of the 10th Area Army, was in a position to advise Ando, the commander on all matters. His connection with the trials of the American airmen lay in his discussions with the commander and with Furukawa, Chief of the Judicial Department, at the time when the original request for instructions was sent to Tokyo on 14th April, 1945 ; in his consideration of the charges against the defendants on or about 16th May, 1945 ; in his discussion with the chief judge and members of the judicial department at the close of the trial on 21st May, 1945 ; in the preparation of a request to Tokyo for final instructions on 22nd May, 1945 ; in his receipt and passing on of the instructions received from Tokyo ; in his receiving and passing on to the commander the protocol of judgment and order for execution ; in his instruction to Furukawa that the records of trial be filed ; and in his instructions to all involved in the trial to state to the Americans as the purported records of trial show.

Furukawa, a Colonel, as chief of the Judicial Department, was shown to have been in a position to influence the actions, not only of his subordinates, but of the other judges on the military tribunal, the chief of staff and the commander, by means of his interpretations of the facts and the law relating to the American airmen. He was the chief prosecutor of the military tribunal.

He was absent from his command during the period in which the American airmen were charged and tried, but his instructions relative to the interpretation of the military law and the theory of accomplices as affecting the guilt of all crew members, including radiomen and photographers, were submitted to the tribunal and to the commander by his assistant Matsuo, as he directed. He gave directions to the prosecutors after the Japanese surrender to strengthen the reports of the interrogations.

Sugiura, a Lieutenant-Colonel, as a member of the Intelligence Department, 10th Area Army, had the means to know the facts involved in the cases of the American airmen. All captured enemy airmen were first interrogated by his Department before being turned over to the Judicial Department for investigation.

Nakano, a Captain, apart from being an associate judge in all the trials, was also a member of the Intelligence Department which questioned the airmen.

Ito, a Captain, was a member of the Judicial Department, 10th Area Army. He interrogated two of the victims. He prepared a protocol of judgment on one of the trials, admittedly knowing that the trial was not completed.

Matsui, a Captain, was a member of the Judicial Department, 10th Area Army and interrogated two of the victims.

Date, a First-Lieutenant, was a member of the Judicial Department assigned to the 7th Shipping and Transportation Command. He was not a member of the 10th Area Army Judicial Department, and had no other connection with the trial or execution of the American airmen than as sitting as judge in one of the trials on 21st May, 1945. It was not clear from the evidence that he knew the charges and evidence to be false.

Fujikawa, a First-Lieutenant, was a member of the Judicial Department assigned to the 8th Air Headquarters. The evidence did not disclose, however, that he had any other connection with the cases against the American airmen other than as sitting as judge in one trial on 21st May, 1945. The evidence against him did not prove conclusively that he knew the charges and evidence to be false.

### 3. THE FINDINGS AND SENTENCES

All of the accused were found guilty.

Seiichi Furukawa and Naritaka Sugiura were sentenced to death; Haukei Isayama and Yoshio Nakano were sentenced to life imprisonment; Masaharu Matsui, Jitsuo Date, Ken Fujikawa and Tadao Ito were awarded terms of imprisonment of 40, 30, 30 and 20 years respectively.

The findings of guilty were approved by the Reviewing Authority with the exception of those against Jitsuo Date and Ken Fujikawa. The sentences against Seiichi Furukawa and Naritaka Sugiura were commuted to life imprisonment. The sentences passed on the remaining four defendants were approved.

## B. NOTES ON THE CASE

The charges brought against the accused in this trial were elaborated in some detail in a Bill of Particulars, but the Commission, while declaring the accused guilty of the charges, did not of course express any opinion as to the Bill of Particulars. In order to ascertain what acts the Commission regarded as war crimes it is necessary to examine the wording of the charges of which the accused were found guilty while bearing in mind that the nature of these offences is made clearer by a scrutiny of the evidence which the Commission chose to admit as relevant.

The charges stated that the accused committed offences against United States prisoners of war " by permitting and participating in an illegal and false trial and unlawful killing " of those prisoners. Some were stated in the charges to have been members of the Tribunal which held the trial, others not. Those found guilty, and against whom the findings were approved, included some accused of both categories. In fact, the trial like the first in this volume is an illustration of the various ways in which an accused can be held liable for war crimes involving the denial of the right to a fair trial. On this aspect of the trials in the present volume, a little more is said on another page.[1]

The following facts arising from the evidence admitted by the Commission are worth recapitulating since they may have been regarded by the latter as proving, or helping to prove, that the accused permitted and participated in " an illegal and false trial and unlawful killing " of the victims :

(i) the evidence brought against the airmen was falsified ;

(ii) little or no evidence connecting the victims with the alleged illegal bombing was produced apart from the falsified statements ;

(iii) the prisoners were denied Defence Counsel ;

(iv) the prisoners were denied the opportunity to obtain evidence or witnesses on their own behalf ;

(v) the greater part of the proceedings were not interpreted to them ;

(vi) all the trials were completed in one day.

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[1] See pp. 70-81.

## CASE No. 33

# TRIAL OF GENERAL TANAKA HISAKASU AND FIVE OTHERS

UNITED STATES MILITARY COMMISSION, SHANGHAI,
13TH AUGUST—3RD SEPTEMBER, 1946

## A. OUTLINE OF THE PROCEEDINGS

### 1. THE CHARGES

The Charge against General Tanaka Hisakasu was that, as Governor General of Hong Kong and Commanding General of the Japanese 23rd Imperial Expeditionary Army in China, he " did, at Canton, China and/or Hong Kong knowingly, wilfully, unlawfully and wrongfully commit cruel, inhuman and brutal atrocities and other offences against " a named United States Major, " by authorizing, permitting, participating in and approving of the illegal, unfair, false and null trial and the unlawful killing " of the Major, in violation of the laws and customs of war.

Major-General Fukuchi Haruo was charged of violations of the laws and customs of war in that, as Chief of Staff of the Governor-General of Hong Kong he " did, at Hong Kong, wilfully, unlawfully and wrongfully commit " offences described in the same manner as those charged against Tanaka.

Lieutenant-Colonel Kubo Nishigai, Major Watanabe Masamori and Captain Yamaguchi Koichi of the Japanese Army of the Governor General of Hong Kong were charged of having " as members of a purported Japanese Military Tribunal," committed offences of the same description at Hong Kong by " acting in, participating in and permitting the illegal unfair false and null trial and the unlawful killing " of the same victim.

Captain Asakawa Hiroshi of the Japanese Army of the Governor General of Hong Kong was charged with committing a violation of the laws and customs of war in that " as Prosecutor of a purported Japanese Military Tribunal " he permitted, prosecuted in and participated in the same illegal trial.

The offence was said to have been committed during April, 1945.

The accused pleaded not guilty.

### 2. THE EVIDENCE BEFORE THE COMMISSION

The evidence showed that on 5th January, 1945, a United States Major, Commanding Officer of the 118th Tactical Reconnaissance Squadron (USAAF), took part in an air raid on shipping and docks in Hong Kong harbour. (Other pilots in the same mission stated that only military targets were attacked.) He was shot down and captured by the Japanese. During interrogations by the Japanese Prosecutor at Hong Kong, Shii (who

committed suicide while awaiting trial), the Major repeatedly stated that he had no intention of attacking any civilian vessel. On being approached by Shii, the legal bureau of the War Ministry in Tokyo replied that prosecution should take place " if it is clear that a civilian steamer was bombed."

Following this, the Major was placed on trial on 5th April, 1945, at Hong Kong. The Court was a Japanese Military Tribunal composed of the accused Kubo as chief judge, and Watanabe and Yamaguchi as associate judges, Yamaguchi being the law member, with the accused Asakawa as acting prosecutor. The Major was charged with having bombed and sunk a thirty-ton Chinese civilian vessel in Hong Kong harbour, on 15th January, 1945, resulting in the death of eight Chinese civilians. This was alleged to be in violation of the Japanese law commonly referred to as the " Enemy Airmen Act." This act had been promulgated in occupied Hong Kong in the year 1942 by the then Governor General Rensuke Isogai, whom the accused Tanaka succeeded in December 1944. In particular, it was charged that the Major had bombed and sunk the Chinese ship in violation of Article 2 of the Act :

> " Those having committed the following acts will be subjected to military punishment : (b) bombing, strafing or attacking in any manner, with *intention* of destroying, damaging or burning private property of non-military nature." (Italics added).

According to the prosecution witness, Nakazawa, who acted as interpreter at the Japanese trial, the Major testified in answer to questions by the law member of the court (Yamaguchi) that he was piloting his plane over Hong Kong harbour and " went into a dive to attack one destroyer," during which he released his bomb ; that the anti-aircraft fire was very intense and while in the dive, the plane was hit and crashed into the sea. He had denied *intentionally* bombing any civilian boat, or seeing such a ship sunk. The witness Nakazawa also testified that the Major had no defence counsel at his trial, and that there were no witnesses excepting the Major himself.

It was shown that the evidence before the Japanese tribunal consisted of three documents, a report on damage submitted by the Chief of Staff, the Gendarmerie report and the prosecutor's statement, in addition to the testimony of Major Houck. The report of the Chief of Staff contained information such as to the date, location, type of ship sunk, and the number of persons killed. This report was submitted over the signature of the Chief of Staff (Fukuchi) in answer to a request by the prosecutor. The report of the Gendarmerie consisted of a " statement of damages suffered in the air raid " and a statement from the Major. The prosecutor's statement consisted of two documents, one based on a questioning of Houck, in which he denied the correctness of the Gendarmerie report and the other a detailed " investigation of the case." Both of these documents were written in Japanese and were purportedly signed by the Major, with his thumb print affixed. These statements were prepared by the deceased Major Shii who investigated the case as prosecutor.

The accused Yamaguchi, however, testified before the Commission that in his opinion the entire trial was conducted properly according to Japanese law.

The acting prosecutor demanded the death penalty for the Major, the entire hearing having lasted not more than two hours. Following this case two Japanese cases were heard by the same court, which then adjourned for lunch.

In a deliberation held after the adjournment, Yamaguchi stated to the other two members of the court that " the facts of crime are clear," that the Major was guilty, and that he interpreted the " Enemy Airmen Act " to require imposition of the death penalty which could be commuted to life imprisonment or more than ten years imprisonment by Tanaka alone. All three judges voted that the Major was guilty and unanimously voted the death penalty, whereupon Yamaguchi prepared the " draft of the verdict " which was announced in open court.

Chief of Staff Fukuchi approved the death sentence and signed the order for the execution of the Major upon being assured by Prosecutor Shii that Houck had admitted attacking and sinking the civilian ship, " resulting in some casualties." Shii then personally directed the firing squad that carried out the order.

The evidence showed that a leading part in arranging the trial was taken by Prosecutor Shii. Further evidence regarding each of those actually brought before the Commission is set out in the following paragraphs.

Tanaka admitted that the court which tried and sentenced the Major to death was under his jurisdiction and that all persons connected with the trial and execution were subordinate members of his commands as Governor-General of Hong Kong and Commanding General of the 23rd Japanese Army at Canton. As early as February he knew that the case was under investigation. He also admitted again hearing of the matter on 20th March, and said that, before returning to Canton on 21st March, he gave Fukuchi full authority to act on his behalf in all matters of the Hong Kong command, leaving with him a number of sheets of paper signed in blank for this purpose. This action was permitting under military regulations and was done to empower the chief of staff to take proper defence measures in the event of Hong Kong being isolated by reason of enemy action. Tanaka was the only person who could have legally approved (or commuted) the death sentence or order the execution.

Before leaving Hong Kong on 21st March, Tanaka appears to have given Fukuchi a " general caution " about taking action in the case. Despite this knowledge of Tanaka, however, there was no evidence that he ordered the holding of the trial or knew in advance that the Major would not receive a fair trial or that he knew or had reasonable grounds to believe that, if the Major should be convicted, the execution of sentence would be carried out without his personal order. The evidence was undisputed that

the record of trial was not submitted to him and that he did not personally order the execution, as was required by Japanese law. His first information as to the verdict and execution of death sentence, was obtained when he returned to Hong Kong about the " middle of April " after the execution had been carried out on 6th April.

Fukuchi admitted hearing of the case shortly after his arrival at his post in Hong Kong as Chief of Staff of the Governor-General, on 22nd February, 1945. Fukuchi transmitted Shii's request to Tokyo for permission to hold the trial, over his own signature, and at his direction a report was prepared on the case which was offered in evidence at the Japanese trial. Prior to appointing the court, he had discussed the matter with Prosecutor Shii on numerous occasions. On the day of the trial, by his own admission, he approved the death sentence and ordered the execution. He did not submit the record and sentence for approval, as was required by the applicable Japanese military law, but acted independently but under the general authority to conduct military and judicial administrative matters, as delegated in a " general order " by Tanaka. Fukuchi seemingly relied to a great extent on the statements made to him by Shii to the effect that the victim had admitted his guilt.

Kubo and Watanabe, a Lieutenant-Colonel and a Major respectively, were members of the court that sentenced the victim to death but were men of little or no legal training. Kubo had had no previous experience in serving on courts and Watanabe had only once served on a military tribunal previously. It appeared from the evidence that they based their verdict and sentence on the views of Yamaguchi, the law member, and on his interpretation of the law. Nevertheless they were under no compulsion to find the Major guilty and both conceded that they could have voted " not guilty".

In a statement taken before his trial, Watanabe said : " Yes, I think that was a very unfair trial ", explaining that he thought that the trial was not fair because the Major had no defence counsel, no witnesses and no opportunity to produce witnesses. In his testimony, Watanabe attempted to retract this part of his former statement.

Yamaguchi was a member of the Judicial Affairs Section attached to the 23rd Japanese Army, with wide court-martial experience, and, in acting as legal officer on the court which sentenced the Major to death, he apparently controlled and directed the actions of Kubo and Watanabe. It appeared that it was his interpretation of the law and his insistence that the victim was guilty that led the other two members of the court to agree to the finding of guilty and to the death sentence.

Asakawa was the acting prosecutor at the trial, but his actions were directed by Shii, although the latter did not actually prosecute.

3. THE FINDINGS AND SENTENCES

All of the accused were found guilty with the exception of Asakawa Hiroshi, and with the deletion of the word " purported " in the charges against the members of the Japanese Military Tribunal.

Tanaka and Fukuchi were sentenced to death by hanging.

Kubo and Yamaguchi were sentenced to imprisonment for life, and Watanabe for a period of 50 years.

The Confirming Authority approved the sentence of life imprisonment passed on Yamaguchi ; but disapproved the sentence passed on Tanaka, and commuted those meted out to Fukuchi, Kubo and Watanabe to periods of imprisonment for life, for ten years and for ten years respectively.

The findings and sentence on General Tanaka were disapproved for the reason that, although Tanaka had final authority in the matter, he was absent from command at the time of the trial, the passing of sentence and the execution of Major Houck, and there was not sufficient evidence of wrongful knowledge on his part of the acts of his subordinates upon which to predicate his criminal responsibility for their acts.

## B. NOTES ON THE CASE: THE CRIMINAL ASPECTS OF THE DENIAL OF A FAIR TRIAL

The charges brought against the accused in the present trial were framed in very general terms ; it was said that they wilfully committed violations of the laws and customs of war against a certain United States prisoner :

(i) by authorising, permitting, participating in and approving of the illegal, unfair, false and null trial and the unlawful killing of the prisoner ; or

(ii) as members of a purported Japanese Military Tribunal, by acting in, participating in and permitting the illegal, unfair, false and null trial and the unlawful killing of the prisoner ; or

(iii) as Prosecutor of a purported Japanese Military Tribunal, by permitting, prosecuting and participating in the same illegal, unfair, false and null trial and unlawful killing.

The accused who were found guilty by the Commission, and against whom such finding was confirmed, were, however, only those who had been charged of offences committed by them *as members of the Japanese Military Tribunal.*

An examination of the evidence admitted by the Commission throws light upon what the latter may have regarded as constituting the offence committed by the members of the Japanese Military Tribunal. In particular the following facts may have been taken as illustrating the " illegal, unfair, false and null " character of the proceedings taken against the Major :

(i) no Defence Counsel was provided for the accused, who was in no position to secure one himself,

(ii) the Major had no opportunity to prepare his defence or secure evidence on his own behalf,

(iii) no witnesses appeared at the trial apart from the Major, and his evidence in which he denied intentionally attacking a civilian boat was ignored by the Tribunal, since, despite that evidence, they found him guilty of an offence against the " Enemy Airmen Act," (1)

(iv) the entire proceedings lasted not more than two hours.

In the first and the third of the United States trials reported in this volume,(2) the Prosecution put in evidence that Japan had agreed to abide by the provisions of the Geneva Prisoners of War Convention ; this evidence took the form of a copy of a letter from the United States Legation in Berne, Switzerland,(3) to the United States Secretary of State saying that, according to a telegraph message from the Swiss Minister in Tokyo, the Japanese Government had informed that Minister, first, that Japan was strictly observing the Geneva Red Cross Convention as a signatory State, and secondly, that " although not bound by the Convention relative treatment prisoners of war Japan will apply *mutatis mutandis* provisions of that Convention to American prisoners of war in its power". The telegraph message had been dispatched on 30th January, 1942.(4)

In the trial of Shigeru Sawada and others,(5) the Defence pointed out that Japan had only undertaken to apply the Prisoners of War Convention *mutatis mutandis*, though no attempt was made to clarify the meaning of this expression. Further, the following statement from Wheaton's *International Law*, Seventh Edition, page 180, was quoted by Defence Counsel in the trial of Shigeru Sawada and Others and in the trial of Harukei Isayama and Others (6) : " If men are taken prisoners in the act of committing or who had committed violations of international law, they are not properly entitled to the privileges and treatment accorded to honourable prisoners of war."

Whatever the legal origin of the rights envisaged, however, it is clear from an examination of the relevant charges, specifications and findings that the court trying certain of the cases reported in the present volume assumed that the victims of the offences alleged were entitled to some kind of prisoner of war status. In particular, the charges on which Shigeru Sawada and others were found guilty in the trial reported first in the present volume are so worded as to make it clear that the denial of the status of prisoner of war was involved, and the Military Commission saw fit not to alter this wording in finding these accused guilty.(7)

(1) See p. 67.
(2) See pp. 1-8 and 66-70.
(3) Switzerland was the Protecting Power for United States interests in Japan.
(4) Japan signed but did not ratify the Prisoners of War Convention.
(5) See pp. 1-8.
(6) See pp. 1-8 and 60-4.
(7) See pp. 10-12. See also pp. 39, 45, 60 and 66.

In the *Yamashita Trial*, the Supreme Court of the United States held that Part 3, entitled *Judicial Suits*, of Part III, Section V, Chapter 3 of the Geneva Prisoners of War Convention applies " only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war." (1) Of the provisions made in Part III, " Captivity," that is to say Articles 7–67 of the Convention, the Supreme Court stated that: " All taken together relate only to the conduct and control of prisoners of war while in captivity as such."

The Allied victims for whose killing the accused were tried in the three United States trials reported upon in the present volume (2) could not therefore have claimed the protection of Part 3, *Judicial Suits*, of the Geneva Convention, since their alleged offences were said to have been committed before captivity ; and this is true whether or not it is accepted that their status was that of persons accused *bona fide* of being war criminals and whether or not the acts alleged against them actually constituted war crimes.(3)

It is arguable that the fact that Articles 60-67 of the Convention (which make up Part 3 referred to above) do not include within their scope the trial of prisoners of war accused of offences committed before capture does not exhaust the protection afforded to such persons by the Convention ;(4) and it must be noted that, even apart from the question of ratification, the Geneva Prisoners of War Convention, at least in those of its provisions which express broad humane principles, is now generally accepted as being only a restatement of customary International Law which binds all States.

The accused in the three United States trials reported in this Volume were not in fact tried and found guilty of offences against Articles 60–67 of the Geneva Prisoners of War Convention. No stress was placed for instance on the fact that the Protecting Power was not notified of the commencement of the trial (cf. Article 60 of the Convention), and it was not claimed that the victims had not been sentenced " by the same tribunals and in

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(1) See Vol. IV of this series, p. 78, where supporting judgments by other Courts are also mentioned. Part 3 comprises Articles 60-67 of the Convention ; for an indication of their contents see Vol. I of this series, pp. 29-30.

(2) See pp. 1-8 and 60-70.

(3) In the trial of Harukei Isayama and others (see pp. 60-4), the Defence argued that the Japanese Enemy Airmen Act was not without some justification in International Law, since indiscriminate bombardment would be a violation of that law. In the trial of Shigeru Sawada, the Defence claimed that it was unlawful to make indiscriminate bombing attacks on non-combatants without aiming at military objectives, and that the United States flyers, in consequence of whose death the trial was held, had acted in this unlawful manner ; the Prosecutor on the other hand maintained that it was inevitable in warfare that some civilians should be injured or killed and that some civilian property should be hit, but that no evidence had been produced in the trial to show that the civilians hit " were not within the factories or the industrial plants."

(4) For instance it would be difficult to deny that such accused are entitled to the protecton of Article 2 : " Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.

" They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.

" Measures of reprisal against them are forbidden."

accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power " (Article 63).(1)

The accused were in fact found guilty of the denial of certain basic safeguards which are recognized by all civilized nations as being elements essential to a fair trial, and of the killing or imprisonment of captives without having accorded them such a trial. Whether the rights which they denied to the captive airmen are regarded as arising from Article 2 of the Geneva Convention or from that customary international law of which that Article is commonly regarded as being declaratory, it is clear that these three United States trials constitute valuable precedents as to the precise nature of the rights which international law requires to be afforded in the trial of prisoners of war accused of having committed offences before capture, just as the Australian trials (2) illustrate the rights which must be granted in the trial of civilian inhabitants of occupied territories accused of committing war crimes.(3)

In the notes to most of the reports in the present Volume, an attempt has been made to set out the facts which the Courts *may* have regarded as

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(1) It was apparently claimed by the Defence in, for instance, the trial of Harukei Isayama and others (see pp. 60-4 of this volume) that the victims were tried under the same procedure as would a Japanese soldier (see p. 62 and see also p. 3). Even this plea, if it were true, would not constitute a complete defence, however, if the trial did not fulfil certain fundamental requirements ensuring elementary justice to the accused. The principle, in so far as peace time is concerned, is well established. Speaking no doubt with peace-time conditions more particularly in mind, Professor Verdross has said that the general principle of international law that foreigners must be granted equality of treatment with nations in matters of judicial procedure may " suffer an exception in favour of the foreigner if the judicial procedure established by the State of sojourn does not achieve the standard to be expected of a normally organized State. . . . The tribunals must, therefore, be organized and function according to a normal standard of civilized States " (*Les Règles Internationales Concernant le Traitment des Etrangers*, in the Hague *Receuil les Cours*, 1931, III, Vol. 37, pp. 334 *et seq.*). Similarly, it has been said that : " It is a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations. For essentially the same reason a State, when charged with a breach of its international obligations with regard to the treatment of aliens, cannot validly plead that according to its Municipal Law and practice the act complained of does not involve discrimination against aliens as compared with nationals. This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum standard of civilization, and that a State which fails to measure up to that standard incurs international liability." (Oppenheim-Lauterpacht, *International Law*, Vol. I, Sixth Edition, p. 316.)

The language used by these two authorities seems wide enough to cover denial of justice to a foreigner, not only in the capacity of a litigant but also in that of an accused, and here will be agreement, at any rate as far as war crime trials are concerned, with the claim of the Prosecutor in the trial of Willi Bernhard Karl Tessmann and others before a British Military Court at Hamburg, 1st-24th September, 1947 :

> " Countries that exist at peace and in comity with each other in general respect the decisions of each other's Courts. In the part of international law that deals with the conflict of laws there is the doctrine known as " denial of justice," which is a method whereby the national of one country who is thwarted by the methods available of litigation in another country may eventually claim reparation or compensation from the country in the courts of which he has been so thwarted. That is, of course, an exception to the general rule of the respect of the courts of one country and the recognition of their verdicts by another. Is not there something analogous to the doctrine of denial of justice in a conflict of laws when one is dealing with foreigners in a country who are punished after being subjected to a criminal jurisdiction which is either nugatory or at any rate extremely inadequate ? "

(2) See pp. 25-38.

(3) There can be no doubt that inhabitants of occupied territories are entitled to at least he same degree of protection when accused of committing any other kind of offence.

constituting evidence of the denial of a fair trial, and, where possible, the circumstances which an examination of the judgments of the Courts in relation to the charges made has shown the courts to have *definitely* regarded as incriminating. It may be of value to recapitulate the account of these circumstances and facts. Light will thus be thrown on the common features possessed by the trials reported upon in this volume, and on the rights thereby vindicated.

The following circumstances have definitely been held by a Court to be incriminating:

(i) that captured airmen were tried " on false and fraudulent charges " and " upon false and fraudulent evidence ".(1)

(ii) that the accused airmen were not afforded the right to a Defence Counsel.(2)

In this connection it should be noted that the judgment of the Supreme Court in the *Yamashita Trial* stated that: " Independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defence." (3)

(iii) that the accused airmen were not given the right to the interpretation into their own language of the trial proceedings; (4)

(iv) that the accused fliers were not allowed an opportunity to defend themselves.(5)

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(1) See p. 12, regarding the findings of the Commission in the trial of Shigeru Sawada and others. In that trial, it was shown that accused allied airmen were tried for offences against a Japanese enactment which was not law at the time of the alleged offence and that the evidence brought against the victims had consisted mainly, if not entirely, of statements made by them before trial, but under torture; it may be added that, in the trial of Harukei Isayama and others, it was shown that the evidence brought against the victims was falsified and that little or no evidence connecting the victims with the alleged illegal bombing was produced apart from these falsified statements (see p. 65); and that, in the trial of Tanaka Hisakasu and others, the evidence proved that no witnesses had appeared at the purported trial of the victims apart from the Major himself, and that his evidence, in which he had denied intentionally attacking a civilian boat was ignored by the tribunal, since, despite that evidence, they found him guilty of an offence against the " Enemy Airmen Act " (see p. 71). In the *Wagner Trial*, held before a French Permanent Military Tribunal, it was alleged that various accused had been implicated in the passing and carrying out of a death sentence on 13 Alsatians on a charge of shooting a German frontier guard, when in fact there was no evidence to support the charge; Wagner and three others were found guilty of premeditated murder for their parts in the death of the 13 victims (see Vol. III of this series, pp. 31-32 and 40-42).

(2) See p. 12. It will be recalled that the failure to provide a Defence Counsel in the purported trial of allied victims was also proved against various of the accused in the trials by Australian Military Courts of Shigeru Ohashi and others (see p. 31), and of Eitaro Shinohari and others (see p. 36), and in the trials by United States Military Commissions of Harukei Isayama and others (see p. 65) and of Tanaka Hisaku and others (see p. 71).

(3) See Vol. IV of this series, p. 49.

(4) See p. 12, and also compare p. 65.

(5) See p. 12. A similar denial was proved in the trial by an Australian Military Court of Eitaro Shinohara and others (see p. 36) and in the trials by United States Military Commissions of Harukei Isayama and others (see p. 65) and of Tanaka Hisakasu and others (see p. 71).

Here it may be remarked that among the principles laid down as the essentials of a fair trial by the Judge Advocate in the trial of Shigeru Ohashi by an Australian Military Court appeared the following: " [The accused] should have full opportunity to give his own version of the case and produce evidence to support it."(1)

The following facts have been admitted in evidence in the trial of war criminals and may have been taken into account by the Allied Courts in deciding on their verdicts and sentences:

(i) accused prisoners of war were not told that they were being tried,(2)
It will be recalled that the Judge Advocate acting in the Australian trial of Shigeru Ohashi and others, in the course of summarizing the essential elements of a fair trial, said that " The accused should know the exact nature of the charge preferred against him."(3)

(ii) accused prisoners of war were not shown the documents which were used as evidence against them,(4)
Here again it is relevant to quote the words of the Judge Advocate referred to above: " The accused should know what is alleged against him by way of evidence."(5)

(iii) the trials of accused prisoners of war and civilians from occupied territories occupied a space of time which may have been thought too brief to allow of an adequate investigation of the facts, particularly in view of the need for proper interpretation of the proceedings.(6)

The Judge Advocate whose words have just been quoted stated, further, that: " The Court should satisfy itself that the accused is guilty before awarding punishment . . .", but there must be " consideration by a tribunal . . . who will endeavour to judge the accused fairly upon the evidence . . . honestly endeavouring to discard any preconceived belief in the guilt of the accused or any prejudice against him."(7) In the trial of Eitaro Shinohara and others by an Australian Military Court, the accused Shinohara, who had been President of the Japanese tribunal which tried certain civilians of war crimes, confessed to having been convinced of the guilt of the captives even before their trial,(8) but it will be recalled that the Confirming Authority did not confirm the findings and sentences of the Australian Court.

The Judge Advocate's final rule was that: " The punishment should not be one which outrages the sentiments of humanity "(9), and this advice should be compared with the decision of the French Permanent Military Tribunal in Strasbourg in finding ex-Gauleiter Wagner and two others

(1) See p. 30.
(2) See p. 13.
(3) See p. 30. It will also be remembered that in the *Wagner Trial*, the Prosecution thought it worth while to allege in their Indictment that the charge against the 13 Alsatians who were accused of shooting a frontier guard was not communicated to the defendants until the afternoon of their trial (see Vol. III of this series, p. 31).
(4) See p. 13.
(5) See p. 30.
(6) See pp. 13, 31, 65 and 71; and see p. 32 of Vol. III.
(7) See p. 30.
(8) See p. 36.
(9) See p. 30.

guilty in complicity in the murder of Theodore Witz ; the act which was deemed to constitute murder was the passing on this young Alsatian of the death sentence (which was carried out) for the illegal possession of a gun of a very old type.(1)

In the three British trials(2) and the Norwegian trial(3) reported on in this volume the Courts were concerned with the legal responsibility of persons shown to have taken part in the execution of Allied nationals rather than with a detailed examination of what would have constituted a fair trial. In two of the British trials, the Defence pleaded unsuccessfully that the victims were first given an interrogation which could be regarded as a trial.(4) In the Norwegian trial, Judge Holmboe stated that it was not correct to say that international law laid down that an occupation power had no right to undertake the execution of citizens of an occupied country except according to sentence by an appropriate Court ; international law did not seem to go beyond the requirement that no execution should take place before proper investigation of the case and a decision passed by an authority legally vested with appropriate powers.(5) This point was not expanded upon, however, since the decision of the Supreme Court rested on other grounds, and it is hoped to report in a later volume in this series upon a further Norwegian trial which is relevant to this issue.(6)

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(1) See Vol. III of this series, pp. 30-31 and 40-42.
(2) See pp. 39-59.
(3) See p. 82.
(4) See pp. 43 and 57. Similarly in the trial of Colonel Satoru Kikuchi before an Australian Military Court at Rabaul, 28th-29th March, 1946, it was shown that in October, 1944, a Chinese prisoner held by Japanese was beheaded by Sgt.-Maj. Inagaki on a written order from Colonel Kikuchi. No court-martial or other formal trial had been held but it was claimed by the Defence that there had been an investigation by Inagaki of alleged war crimes and acts of hostility by the Chinese victim against the Japanese. The accused admitted that he had ordered the death of deceased but maintained there was sufficient evidence for him to be satisfied of the guilt of the Chinese and that he had carefully examined that evidence. He alleged that the serious war situation justified his order, though no court-martial was held and that the investigation made by Inagaki and his decision constituted a summary trial which was legal under Japanese military law. This plea was also unsuccessful, and the accused was sentenced to death, his penalty being commuted to seven years' imprisonment by higher military authority.
(5) See p. 91.
(6) In the trial before a British Military Court at Hamburg, 1st-24th September, 1947, of Willi Bernhard Karl Tessmann and others, it was stated in the second charge that four of the accused were guilty of committing a war crime in that they, " in violation of the laws and usages of war," were concerned in the killing of eleven Allied nationals, formerly interned in Fuhlsbuttel Prison." In his summing up, the Judge Advocate stated : " Mr. Barnes for the Prosecution has advanced very clearly, and, if I may be allowed to say so, most helpfully, an argument as to what constitutes a legal killing, what preliminary formalities must in a civilized society be established : a fair trial, legal assistance and an impartial tribunal. That will help the court. But he has also invited the court to view this matter in the way of commonsense. I feel that the Court will be anxious to view this matter humanely and practically and to ask themselves : On that early morning of February or March, 1944, had those who were parties to this shooting any right to question ? Had they any power to decline to do that which they were required to do ? " After quoting the well-known passage from the *Manual of Military Law*, which has already been quoted (see p. 14), he added : " An application of those principles in the second charge, I suggest is this. If this were an illegal execution—and I do not think you will regard it as a deliberate murder—then were the orders received by the subordinates so plainly unlawful that they should, whatever the consequences, have declined to act upon them ? " The words of the Prosecutor to which the Judge Advocate was making reference were the following :—

*continued on next page*

It may be added that, whatever the legal status of the victims of the offences proved in the trials reported on in this volume, they were not accorded those rights, essential to a fair trial, which have been generally afforded to alleged war criminals in their trial by Allied courts after the Second World War.(1)

Finally, it may also be useful to say some words in recapitulation regarding the different capacities in which various of the accused involved in trials reported in the present volume were acting when they became responsible for the acts or omission with which they were later charged as war criminals.

Most of these accused had acted as judges in purported trial of Allied victims, and it is not proposed to repeat the names, relevant activities and sentences of these defendants. They present few border-line problems ; none of those proved to have acted as judges were declared not guilty by the Allied Courts which tried them, though the sentences passed on two were not confirmed.(2)

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" I put what I conceive to be the three minimum requirements of a fair criminal court, a criminal court the decisions of which international law will respect as being worthy of legal validity. The first requirement is that there shall be an impartial judge or tribunal. I say ' or tribunal ' because it does not matter whether the judge is a single individual or a panel of judges. The second requirement is, in my submission, a hearing at which the accused must be present and at which he must be allowed to make out his own defence and possibly to call witnesses. The third requirement is facilities for the preparation of his defence and for the calling of witnesses in his defence, and those facilities include expert legal advice.

" If one compares the kind of legal proceedings which are alleged to have taken place regarding the victims of charge 2 to persons charged with capital crimes in England, there is, of course, an enormous contrast : the proceedings for committal to trial, the immediate allocation of defence counsel and solicitors, and eventually, after a lot of time and a lot of formality, a full dress trial before judge and jury.

" Dealing with international law, I do not suggest that the details of any domestic criminal jurisdiction should be required. One requires only the basic minima which would show that the verdict of the court in question may have been a fair one. But these three minimum requirements (and I am omitting now the detail of whether there is a jury or a committal for trial and all those other procedural matters), an impartial judge, a hearing at which the accused is present and is allowed to make out his own defence, and facilities for the preparation of his defence, are in my submission the minimum requirements for any trial the legal validity of which should be recognized by a tribunal which, like this tribunal, is administering international law."

(1) This avenue cannot be explored to the full in these pages but reference should be made to *Information Concerning Human Rights arising from Trials of War Criminals*, a Report prepared by the United Nations War Crimes Commission in accordance with a request by the Human Rights Secretariat of the United Nations, November, 1947, Chapter III, pp. 317-329. Here, the Charters of the International Military Tribunals of Nuremberg and Tokyo, together with the law and practice of the various Allied nations whose courts have tried war criminals after the Second World War, have been analysed to show how accused war criminals have in general been guaranteed, as aspects and illustrations of the general right to a fair trial, the following : the right to know at a reasonable time before the commencement of trial the substance of the charge made against them ; the right to be present at their trial and to give evidence ; the right to enjoy the aid of Counsel ; the right to have the proceedings made intelligible by interpretation ; and the right of appeal or of review by some higher authority. Much of the information set out in these pages of the Report is also available in the volumes of the present series, and particularly in the annexes dealing with the war crimes laws of individual States.

(2) These were Jitsuo Date and Ken Fujikawa, two of the accused in the trial of Haruke Isayama and others. For the evidence regarding these two see pp. 62-4.

It may be worth adding that not all of the judges found guilty had acted in quite the same capacity. For instance, Yamaguchi[1] and the accused Wako Yusei[2] had both acted as Law Members of the Japanese Courts on which they sat. Again, in the trial of Harukei Isayama and others, the accused Sugiura was shown to have acted as Chief Judge and thus to have held a position presumably of greater responsibility than some of his colleagues.[3] It is not, however, proposed to attempt here to show the possible correlation between these various degrees of responsibility and the sentences meted out to the accused, though such an analysis would constitute an instructive field of study.[4]

Fewer than the accused judges were those defendants who had acted as prosecutors before the enemy courts which tried Allied victims: These accused included Masaharu Matsui and Tadao Ito, who were among those found guilty in the trial of Harukei Isayama and others ; it was shown, however, that they had also acted as judges in others of the trials referred to in the charges made, and a study of these charges together with the findings of the court shows that each of these two accused was in fact found guilty of offences committed " as a member of a Japanese Military Tribunal."[5] Another accused who was found guilty in the same trial was Seiichi Furukawa, who had been in a position to give orders to those who acted as prosecutors at the trial of the Allied victims ; the evidence showed, however, that he had been involved in several other ways in the passing of the death sentences on the latter.[6] Finally, in the trial of Tanaka Hisakasu and others, it was shown that the accused Asakawa Hiroshi had been the acting prosecutor in a trial which resulted in the death of an Allied victim ; he was shown to have acted under the dominant influence of Prosecutor Shii, however, and was found not guilty by the United States Military Commission which tried him.[7]

Among the accused in the trials reported on in this volume there appeared two higher officers having an overall responsibility for the proceedings taken against the Allied victims by persons under their command. Reference

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(1) See pp. 67 and 69.
(2) See p. 5.
(3) See p. 62.
(4) Before leaving the question of the criminality of the accused judges, it should be mentioned that in the *Wagner Trial* the accused Huber who had been President of the Special Court at Strasbourg, was sentenced (in his absence) to death, having been found guilty of complicity in the murder of 14 victims, on whom he had passed unjustified death sentences which were carried out (see Vol. III of this series, pp. 31, 32 and 42).
(5) See pp. 60, 62 and 64.
(6) See pp. 61-3.
(7) See pp. 67, 68 and 69. In the trial of Wagner and others by a French Permanent Military Tribunal, Luger, who had been Public Prosecutor at the Special Court at Strasbourg and as such had demanded an illegal sentence of death on the 13 Alsatian victims, was found to have been an accomplice in the murder of the latter ; in view of the fact that he had acted on the orders of Gauleiter Wagner, however, the French Tribunal acquitted him (see Vol. III of this series, pp. 31-32, and 42). The position of Wagner himself, and that of the head of his "Civil Cabinet," Gädeke, are not analogous to those of any of the categories mentioned in the text above. Wagner was found guilty of complicity in the murder of in all 14 Alsatians wrongly sentenced to death by the Special Court at Strasbourg, since he had, while Gauleiter and Head of the Civil Administration in Alsace, and in abuse of his authority ordered the sentences awarded to the victims and carried out. Gädeke was also found guilty of complicity in the same murders, since he had passed on Wagner's orders that the illegal sentences be carried out (see Vol. III, pp. 31, 32, 40 and 41).

should be made in this connection to the evidence relating to Major-General Shigeru Sawada(1) and General Tanaka Hisakasu.(2) Both were found guilty, but the Confirming Authority disapproved the sentences passed on the second accused. It will be recalled that both generals were away from the scene at the time when the purported trials were held. Whereas Shigeru Sawada was personally informed of the proceedings on his return,(3) however, Tanaka Hisakasu did not return to his command headquarters until after the execution of the victim and was not proved to have known in advance that the trial would not be fair or to have known or had reasonable grounds to believe that, if the prisoner should be convicted, the execution of the sentence would be carried out without his consent, which was required by Japanese law.(4)

Lieutenant-General Harukei Isayama(5) and Major-General Fukuchi Haruo,(6) who were among the accused found guilty in two of the trials reported upon in the present volume, had each acted as Chief of Staff to a Commanding General under whose authority a trial of Allied victims had been held. Both were thoroughly acquainted with the nature of the proceedings which were being taken against the Allied prisoners, and their being found guilty is evidence of the responsibility of a Chief of Staff, as distinct from a Commanding General, in cases of denial of a fair trial to prisoners.

Finally, several of the accused in the trials reported on in this volume had acted as executioners or had in some way been implicated in the carrying out of the sentences passed by enemy courts or supposed courts upon Allied

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(1) See pp. 1, 4-5 and 8.
(2) See pp. 66, 68 and 70.
(3) See p. 4. Sawada also admitted having had jurisdiction over the prison where certain of the victims had been incarcerated under the conditions described on p. 6. Counsel for Sawada attempted to distinguish the charge against that accused from the charges that had been made against General Yamashita (see Vol. IV of this series, pp. 1 *et seq.*); in the course of his argument appear the following passages: " The Commission will notice an extreme difference in the way Yamashita was charged and the way General Sawada was charged. General Sawada is charged that he did appoint a Commission, that he did direct a Commission, that he did direct and authorise cruel and brutal atrocities, that he did confine and deny the status of prisoners of war. In other words, it is charged in this case that General Sawada himself did these acts; not that he permitted others to do it. If we now try to find him guilty of permitting others to do these things, we find him guilty of an entirely different offence than what he is charged with in the specifications. I will go farther, however, and say even if charged with permitting it should not make any difference. The Yamashita case involves as I mentioned some 123 different atrocities involving the death of 25,000 innocent people. This case involves a trial and a conviction. There is no comparison as to the extensiveness of the Yamashita charges and the charges in this case. None whatsoever. In the Yamashita case it was pointed out that the atrocities were and the words are from the decision itself—" widespread and extensive." We cannot say the acts that took place in Shanghai regarding these fliers were widespread and extensive. It was not the type of act that shows complete negligence of General Sawada to perform his duties. He did not completely fail as commander. . . . I submit, therefore, the Yamashita case is no authority for this case. The Yamashita case fails, and I know of no other authority or decision of any type which says that command responsibility is the same as criminal responsibility."
It will be noted, nevertheless, that in its findings the Commission which tried Sawada struck out the words " knowingly " and " and wilfully " from the charge made against him, and its conclusions also show that it regarded the accused's guilt as arising from negligent omission rather than deliberate action. (See pp. 7-8.)
(4) See p. 69.
(5) See pp. 60, 62, 63 and 64.
(6) See pp. 66, 67, 68, 69 and 70.

nationals. In the trial of Shigeru Ohashi and six others by an Australian Military Court(1) all of the accused were shown to have taken part in the execution which followed the trial of 18 civilians in occupied territory, but the only accused to be found guilty of the murder of these victims were the two who had also acted as their judges ; these found not guilty comprised the person who had acted as interpreter at the trial and four others who were not shown to have been present at the proceedings or to have had knowledge of their nature.(2)

Sotojiro Tatsuta, one of the accused in the trial of Shigeru Sawada and others (3) was found guilty, *inter alia*, of causing the death of three United States prisoners of war by " knowingly, unlawfully and wilfully " executing the orders of a Japanese Military Tribunal. The writ of execution, however, appeared on its face to be legal, and while it was true that Tatsuta visited the courtroom for a short while during the so-called trial, there was no conclusive proof that he had either actual or constructive knowledge of the illegality of the Enemy Airmen's Act, the trial held under it or the sentences passed at the trial. The Reviewing Authority disapproved the finding of guilty against Tatsuta on this point.(4)

In approving the appeal of Oscar Hans, a former executioner, the Supreme Court of Norway held that the question to be decided was whether the appellant had been aware that the Norwegian victims, of whose murder he had been found guilty by the Eidsivating Lagmannsrett, had not been

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(1) See pp. 25-31.
(2) See p. 26.
(3) See pp. 1-8.
(4) See pp. 1, 2, 6, 7 and 8. During the course of the trial the Defence claimed that the Commission should not require Tatsuta to have questioned his orders to execute the prisoners ; Counsel argued as follows : " What about Tatsuta ? He was an executioner and a jailer. Is he supposed to go behind the court sentences, behind the orders of the 13th Army, Nanking Headquarters, on up to Tokyo ? " Here is what the American Law says of a person who acts pursuant to a court sentence : In Law Reports Annotated, page 4199, para. 68, the case of Erskine v. Huhnbach, a U.S. Supreme Court case is cited, and I quote : " An order or process issued by an officer or tribunal having jurisdiction over the subject matter upon which judgment is passed, and with power to issue the same, if regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, will give full and entire protection to a ministerial officer in its regular enforcement, against any prosecution which the party aggrieved thereby may institue against him.

" In 26 American Jurisprudence, para. 110, we find this statement : ' The execution of a death sentence pursuant to official duty and in obedience to law can constitute no offence, since it is in the advancement of justice, it is deemed justified.'

" In the case of Stutsman County v. Wallace, Vol. 142, U.S. Reports 293, 12th Supreme Court Reports 227, I quote this Supreme Court decision : ' Ministerial officers acting in obedience to process regular on its face, and issued by an officer or tribunal having jurisdiction of the subject matter and power to issue the process, are not liable for its regular enforcement, although errors may have been committed by the officer or tribunal which issued it.'

" What does all this mean ? It means that Tatsuta, if he had done the same acts in the United States, no U.S. court could have touched him because he acted pursuant to a lawfully appointed constituted tribunal of his own country. We have to protect such persons in our country in order to advance justice, in order that a court's sentence, or court's decision can be put into effect and force right away. It could never be a binding decision of the court otherwise. We are asking Tatsuta to be held to higher standards than we are asking our own people to abide by."

The Defence claimed that the Japanese tribunal had been lawfully constituted and had had the requisite jurisdiction, and that, even if its decision was improper, Tatsuta had no authority to examine whether it was proper or not.

tried and sentenced according to law. Judge Holboe pointed out that it was not sufficient for a conviction for wilful murder to show that the accused ought to have known the circumstances which made his act illegal.(1) The validity of this argument seems, however, to arise from the fact that Hans had been tried for an offence against Article 233 of the Norwegian Civil Criminal Code, which requires that an accused must be shown to have acted wilfully(2) and it may be noted that a minority of judges on the Lagmannsrett were prepared to consider whether the accused could be held guilty of inadvertently causing the victims' death, under Article 239 of the Civil Criminal Code(3) but that on the facts they found Hans not guilty of such an offence.(4)

In the British trials reported upon in the present volume(5) a number of accused were found guilty of being concerned in the execution of Allied victims. On behalf of the defendants, it was pleaded that the victims had received a fair trial or that at any rate the accused could reasonably assume that this was so and were not in a position to enquire into the legality of the executions which they had been ordered to carry out. In each of the three trials the Judge Advocate expressed the opinion that there was no evidence of a real trial ever having been held(6) and in finding most of the accused guilty the Courts may have been influenced by the conditions of secrecy in which the killings were carried out. It will be recalled that in the trial of Karl Buck and Ten Others, the Prosecutor submitted that the obliteration of all traces of the crime and the steps taken by the accused to suppress all knowledge of the crime belied any contention that they thought that they were performing a legal execution. Lawful executions did not take place in woods, nor were those shot buried in bomb craters with their valuables, clothing and identity markings removed.(7)

It should be added in conclusion that Volume VI of this series contains reports on further trials involving charges of denial of a fair trial, particularly the trial of Josef Altstötter and Fifteen Others, by a United States Military Tribunal at Nuremberg, 3rd March–4th December, 1947 (*The Justice Trial*). The defendants in this latter trial had been judges, prosecutors and/or Ministry of Justice officials under the Third Reich and were charged, *inter alia*, of war crimes and crimes against humanity committed in the course of their participation in the debasement of the German legal system to the ends of Nazism. The legal notes appearing in Volume VI will, consequently, deal further with the state of international law on the question of the denial of a fair trial and other related aspects of the denial of justice.

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(1) See p. 91.
(2) See p. 82.
(3) See p. 89.
(4) See p. 89. According to Article 233 of the Norwegian Civil Criminal Code, a person who wilfully causes another person's death or is an accomplice to such an act, is punishable with imprisonment for up to six years. If the act was done not only wilfully but with premeditation, or if it was committed in order to facilitate or conceal another crime or to avoid punishment for such other crime, life imprisonment may be inflicted. The same applies in cases of repeated violations and when other particularly aggravating circumstances are present. Article 239, however, provides as follows: " He who inadvertently causes another person's death, shall be punished by imprisonment for a period of up to three years. In particularly aggravating circumstances, imprisonment for a period of up to six years may be imposed. In particularly mitigating circumstances fines only may be imposed."
(5) See pp. 39-59. (6) See pp. 44, 52 and 58. (7) See p. 43.

## CASE No. 34

# TRIAL OF
# HAUPTSTURMFÜHRER OSCAR HANS

EIDSIVATING LAGMANNSRETT, JANUARY, 1947, AND SUPREME COURT OF NORWAY, AUGUST, 1947

## The extent of liability of an executioner for illegal executions, and the effect of superior orders in this connection

## A. OUTLINE OF THE PROCEEDINGS

### THE INDICTMENT

Defendant Hans was charged by the Director of Public Prosecutions with having committed war crimes which were in violation of Articles 1 and 3 of the Provisional Decree of 4th May, 1945, with which should be read the Law of 13th December, 1946, Article 233 of the Civil Criminal Code, and Article 62 of the Civil Criminal Code.(1)

The indictment claimed that the defendant, a member of the SS, had been employed, from 25th April, 1940 onwards, in Section (Abteilung) I of the Sipo in Oslo. From the beginning of 1941 he was also leader of the Sonderkommando, in which capacity he was in charge of the execution of the death sentences passed by the S.S. und Polizeigericht Nord, the German Standesgerichts and the Feldgerichts. As leader of the Sonderkommando he was responsible for the execution of at least 312 Norwegian patriots of whom 68 were executed without previous trial.

The allegations made against him were set out in five Counts, as follows :

*Count* 1 : that on 30th April, 1942, the Sonderkommando under the defendant's leadership executed 18 named Norwegian citizens. The executions took place on orders from the Reichskommissar as a reprisal for the killing of two German policemen by Norwegian saboteurs from England. All the victims were innocent as they were in prison at the time of the killing of the German policemen.

*Count* 2 : that on 6th October, 1942, 10 named Norwegian citizens were executed by the Sonderkommando under the defendant's leadership. The executions took place without previous trial. According to a statement to the Press by Der Höhere S.S. und Polizeiführer, the victims were shot as a reprisal for several attempts at sabotage which had led to the declaration of a state of emergency in the Trondheim area. The victims were not responsible for the acts of sabotage.

(1) For a general account of the Norwegian law concerning the trial of War Criminals, see Vol. III of this series, pp. 81-92.

*Count* 3 : that on 21st July, 1944, five named Norwegian citizens (among them two women) were executed without trial. The executions were decided on by leaders of the Sipo who, according to Hitler's orders of June-July, 1944, were given a free hand to decide upon any executions.

*Count* 4 : that on 5th September, 1944, the Sonderkommando under the defendant's leadership executed 17 named Norwegian and six named Russian citizens. The executions were carried out without trial and were based on a decision by the Sipo.

*Count* 5 : that on 30th or 31st October, 1944, 14 named Norwegian and eight named Russian citizens were executed by the Sonderkommando under the defendant's leadership. The executions were carried out without previous trial and were based on a decision by the Sipo.

The Public Prosecutor acting in this trial was Statsadvokat Harald Sund. Counsel for the Defence was Höyesterettsadvokat Adam Hjorth.

## 2. THE EVIDENCE

It was established that the defendant arrived in Oslo on 25th April, 1940, together with a detachment of the Sipo on orders from Berlin and was appointed to Section I of the Sipo. The whole of the Sipo in Norway comprised six sections and was under the command of Fehlis. The Chief of the defendant's section was Obersturmbannführer Keller.

The defendant achieved the rank of Hauptsturmführer and became head of a department whose work was of an administrative and organizational character, similar to that which he had held in Berlin. The defendant was at the same time appointed Hauskommandant of Victoria Terrasse, in which capacity he was in charge of the security of the various offices housed in the building. As Hauskommandant he was directly subordinate to Fehlis.

The defendant and his staff of 22 were in charge, among other things, of the entering of all the Sipo's incoming post into a register before they were distributed among the various offices. Communications which bore the stamp " Secret " were entered into a special book and post which was stamped " Secret " on the envelope was passed on without being opened in the defendant's office. On an average about 500 letters from Norway, 100 from Germany and about 50 teleprinted communications and a series of telegrams were entered every day. The communications were mostly opened by the chief registrar, but it often happened that the post was dealt with by the defendant himself. (The above details were regarded by the Lagmannsrett as relevant to the case in so far as they went to show that the defendant could not have been informed about *all* the secret orders which came from Berlin.)

At the beginning of 1941, the Sipo in Oslo set up a so-called Sonderkommando, a detachment organized on military lines, entrusted with the safeguarding of the Sipo headquarters from enemy attacks. The defendant became leader of the Sonderkommando and had a staff of three officers

and 35 men, mostly members of his own department. In his capacity as leader of the Sonderkommando the defendant was directly responsible to Fehlis who in his turn was responsible to General Rediess, whose title was " Gerichtsherr " and who was in charge of all the police forces in Norway.

During the first state of emergency in Oslo in September, 1941, the defendant received orders for his Sonderkommando to undertake the execution of Norwegians sentenced to death by German courts in Norway. This being the first job of its kind, the defendant was given detailed instructions by Fehlis. According to the defendant these regulations concerning executions laid down among other things that an execution order (Vollstreckungsbefehl) had to be given in writing ; that the sentence had to be made known to the victims in German and Norwegian ; that the execution was to be carried out by shooting—three men to one victim ; that the victims were to be blindfolded but not bound ; that the corpses were to be buried in a communal grave and not to be delivered to the families ; that the presence of any outsiders, even a doctor or a clergyman, was forbidden, and that the whole execution had to be carried out in absolute secrecy.

According to the defendant's statement he also received an " Auslieferungsschein " (order for delivery) from Section IV of the Sipo against which the prisoners were handed over and a list containing the names and personal details of those sentenced to be executed. The defendant was told by Fehlis that those documents were sufficient. He had never received any communication direct from any of the courts.

Most of the death sentences executed by the defendant were passed by the S.S. und Polizeigericht Nord, by the Feldgericht (the S.S. und Polizeigericht Nord on circuit), some by courts-martial and on three occasions by civilian Standesgerichts—namely, during the two states of emergency in Oslo in September, 1941, in the winter of 1945, and during the state of emergency in Trondheim in October, 1942.(1)

The Lagmannsrett found it necessary to go into the details of the procedure followed after the sentence had been passed by the S.S. und Polizeigericht Nord. Copies of the sentence were sent to Rediess and Terboven for confirmation and, if this was given, three further copies were sent to the Untersuchungsführer, who in his turn dispatched them to Fehlis who made out the execution orders which contained whatever Fehlis found necessary to impart to the leader of the Sonderkommando. The execution order was always handed to the defendant by Fehlis himself and stated, besides the name of the convicted person, that sentence (Urteil) had been passed and that the person had been sentenced (verurteilt) for having committed a particular crime, which was described in a few words. The order was signed by Fehlis only. It always stated the name of the court when the sentence had been passed by the S.S. und Polizeigericht Nord ; in other cases there was no reference to a court.

(1) It appears, however, from the Indictment that the defendant was only charged with those executions which were carried out without any previous trial.

In June/July, 1944, a decree was issued on Hitler's orders from Berlin which abolished tribunals in occupied countries. The Sipo in each country was vested with discretionary powers to decide on executions in cases where offences of a political character had allegedly been committed. The reason for promulgating the decree was that it had been found that holding of tribunals did not have the desired deterrent effect on the population and that it would be far more efficacious if the German police were given free hand in deciding on executions whenever they deemed necessary. It was also considered that it might have a chastening effect on any subversive activities if people simply disappeared and were never heard of again. This decree was put into force in Norway.

According to a statement by the then President of the S.S. und Polizeigericht Nord, Dr. Latza, who was appalled by the abolition of all judicial safeguards, he had immediately asked for interviews with the Chief of the Gestapo, Reinhardt, and with Terboven, who had both told him that they found the Führer order very sensible and serviceable. Dr. Latza had gone to Germany in order to see if an exception could be made in the case of Norway but had to return having achieved nothing.

(The Regulation to abolish tribunals did not, however, come up to expectation and in January, 1945, the SS. und Polizeigericht Nord was reinstalled with the additional authority to pass prison sentences.)

After the decree of June/July, 1944, came into force, Fehlis personally gave orders for a series of executions. The defendant still received the execution orders from Fehlis in writing. The documents stated that the person to be executed had been " sentenced " but did not make reference to any court.

### 3. THE JUDGMENT OF THE LAGMANNSRETT, 17TH JANUARY, 1947

The defendant was found guilty and sentenced to death by shooting.

The Lagmannsrett considered it an indisputable and basic rule of international law that an occupation power had no right to undertake the execution of citizens of the occupied country or enemy citizens in occupied territory without a trial by an appropriate tribunal. (See Article 30 of the Hague Convention No. IV of 1907, regarding the laws and customs of land warfare, which lays down that a spy caught *in flagrante* cannot be punished without previous trial and sentence.) Hitler's decree of June/July, 1944, on the abolition of German tribunals in occupied countries constituted without doubt a breach of the basic rules of international law, and he who had acted on that decree must be prepared to face criminal responsibility.

It had been stated in the Indictment that the defendant had executed at least 312 named Norwegian patriots ; that figure, on the recommendation of the Public Prosecutor, was reduced to at least 268, of whom 68 were executed without trial. The defendant himself insisted that he had been

in charge of the execution of only 215 persons, mainly Norwegians. The Lagmannsrett did not find it necessary to insist on a definite figure for the total number of executions, as the defendant had been charged only with responsibility for those executions which had been carried out without the decision of a court, as the Prosecution had realized that according to international law an occupation power had the right to pass death sentences on citizens of the occupied country through their established courts.

The Lagmannsrett acquitted the defendant on Count 1 of the Indictment as it was held that at that time the defendant may have been in justifiable ignorance of the fact that the executions were decided upon without previous trial. The Court stressed the fact that on that occasion the Untersuchungsführer had attended the execution and had read out the contents of the documents to the victims, a circumstance which might have given the defendant the impression that sentence had been passed by a court.

As to Count 2, the prosecution had already before the trial decided to withdraw the charge involved.

The Court acquitted the defendant of the execution of the *Russian* citizens mentioned in Counts 4 and 5, as it might be considered that the defendant might have assumed that those sentences had been passed by the Wehrmacht's courts-martial.

As regards the executions of Norwegian victims referred to in Counts 3, 4 and 5 of the Indictment, the Lagmannsrett held that the terms of Articles 1 and 3 of the Provisional Decree of 4th May, 1945, in so far as they defined the *actus reus* had been fulfilled and that the acts therefore could be regarded as being at variance with the laws and customs of war. The Court thereupon proceeded to examine whether the mental element of the crimes had also been present, as laid down in the same provisions.

It had been stated by the defendant that during his office he had always been aware of the fact that no execution could legally be carried out without a trial. After having heard the evidence submitted to the Court, he could not but realize that some of the executions had in fact been carried out without previous trial. He had, however, pleaded that he could not see how he could be held responsible for having acted *bona fide* on Fehlis's orders. He had received the execution orders from Fehlis personally and they had all stated that the condemned had been " sentenced " to death. He had been confident that Fehlis would not give him orders which were in any way contrary to law. He had considered that he owed the same obedience to his superior as a soldier of the Wehrmacht owed to those above him in rank.

When considering the question of how far defendant had acted *bona fide* the Lagmannsrett found :

> that in the cases referred to in Counts 3, 4 and 5 (those executed after the decree of June/July, 1944) the defendant had already gained enough experience to be able to judge whether the execution orders were fully

lawful, i.e., whether they were preceded by a trial. In his first statement to the Court, the defendant had confessed to the knowledge of Decree No. 7 of 31st July, 1941, which normally presupposed the declaration of a state of emergency before any civilian court-martial authorized to pass the death sentence on civilians could be set up. Later the defendant had withdrawn his admission and professed ignorance on that point. The Court, however, felt bound by the defendant's original statement ;

that defendant must have had sufficient reason to doubt the legality of the execution orders as no state of emergency had been in force at that time ;

that the Reichskommissar's declaration to the Press on the executions referred to in Count 1 ought to have made defendant apprehensive of any possible illegality, which declaration was made the day after the executions had been carried out ;

that since, according to the defendant, some execution orders had stated that the sentence had been passed by the S.S. und Polizeigericht Nord, he should have surmised that in cases where the name of a court had not been given, the order might be unlawful ;

that after having read the regulations concerning the duties of the Sonderkommando, the defendant must have realized that Fehlis himself did not keep to those regulations. For instance, the defendant had stated that only in a few instances had he received a copy of the sentence itself which, according to the regulations, should have been made known to those sentenced. Moreover, the substance of the sentence had only been referred to in a few words, not sufficient to show to those sentenced the reasons for the sentence ; neither had any representative from the courts attended the executions, except in one or two instances. In those circumstances the defendant's suspicions as to the legality of the executions ought to have been roused.

The Court realized that the decree of June/July, 1944, and its putting into effect, had been a matter of the utmost secrecy, and it could therefore be assumed that the defendant's superiors had not acquainted him with it. The Court also understood that the defendant could not, without serious consequences to himself, have approached Fehlis direct and asked for an explanation in order to ascertain the legality of the execution orders. What was considered decisive in the opinion of the Court was that defendant had at no time done anything to ascertain that the execution orders were legal ; neither had he at any time taken any steps to be transferred to some other work or to active service. The Court held that information regarding the legality of the orders might have been obtained by the defendant had he approached members of the S.S. und Polizeigericht Nord or the registrar of the Court. On the basis of such information it may be assumed that defendant could have taken measures to obtain a transfer to the front line or to other work without incurring the possibility of disciplinary action.

In view of these circumstances, the Court found that they could not accept the defendant's plea of having been ignorant of the change in the

situation after the decree of June/July, 1944. Even if he had not been directly informed of the decree or its contents, he must have known that prisoners were no longer tried by the Polizeigericht and Standesgerichts. The Court considered that defendant must have been aware of the situation when he received the execution orders mentioned in Counts 3, 4 and 5 of the Indictment. In that connection the Court recalled that the defendant, besides being leader of the Sonderkommando, had continued to be head of the department and of his staff of 22, and it could, therefore, be assumed that among other secret documents which he registered there must have been some which might have given him a hint as to the change in the position after tribunals were abolished.

The Court, therefore, assumed that defendant must have known that the persons referred to in Counts 3, 4 and 5 of the Indictment had been executed without trial. The Court could not accept the plea that defendant had assumed that everything was in order because he received the execution orders from Fehlis himself and that they contained the word " sentenced". He must have realized that he was running a risk in accepting the legality of the documents *bona fide* and must, therefore, be assumed to have acted knowingly in the sense signified by that term in Criminal Law. According to Article 5 of the Provisional Decree of 4th May, 1945, superior orders could not as a matter of course be regarded as exculpatory.

It had been pointed out by the defence that the real criminals in the case in hand were Fehlis and Terboven. Had they not committed suicide, the defendant would hardly have been charged with those crimes. The Court could not accept that argument. The German occupation powers had employed violence and used their power contrary to international law, and as a result punishment must be meted out not only to those who had issued the orders but also to their subordinates if blind obedience had made it possible to put into effect such a criminal system.

Two of the judges dissented from the opinion held by the majority of the Court and voted for defendant's acquittal on all counts. In their opinion no sufficient proof had been brought in support of the charge that defendant had known or understood that the executions he had carried out were decided on without trial, and they referred to what had been said above in connection with Count 1 of the Indictment. The decree of June/July, 1944, was " top secret," and it may be assumed that as its intention was to terrorize people by leaving them in ignorance of what was happening, it was in the interest of the occupation powers to keep it *sub rosa*. It had not been proved that the defendant was among those to whom the secret was imparted. Neither did any other of the prevailing circumstances justify the conclusion that the defendant had been aware of the situation. It was true that he held a comparatively high position within the Sipo but he was not a member of its executive organ—the Gestapo—and was not concerned with investigations and with prisoners. Neither was there sufficient proof to refute the defendant's statement that the execution orders invoked in Counts 3, 4 and 5 of the Indictment were in all other respects similar to those he had received in previous cases, except for the mention of the name of a court. It must be remembered that the name of the court had also been

omitted when the sentence had been passed by a Standesgericht. The minority pointed out that it had been stated in the execution orders issued and signed by Fehlis that those to be executed had been sentenced to death (zum Tode verurteilt) and that it had been stated in each individual case when they had been sentenced, for what crime and according to which provisions of the German Criminal Law.

The minority further pointed out that the fact that the executions referred to in Courts 3-5 of the Indictment were carried out when no state of emergency had been declared was no real proof that defendant must have surmised that everything was not in order. It was common knowledge that very few Germans knew that as a rule a state of emergency had to exist before a Standesgericht could be set up. It must be remembered in that connection that, in 1945, the Standesgericht did pass sentences without a state of emergency having been declared.

The minority held that the prosecution had not succeeded in proving that the defendant ought to have been aware that the executions referred to in Counts 3-5 of the Indictment were different in respect of legality from those carried out previously, which, the Court had decided, were not contrary to international law. The minority, therefore, considered that defendant's acts had not the requisite mental element as laid down in Article 233 of the Civil Criminal Code (having acted knowingly), and proceeded to examine whether his acts could be brought within the scope of Article 239 of the Civil Criminal Code, i.e., whether he could be regarded as having caused the victims' death inadvertently. In that connection the German regulations which were used at executions had to be considered. The defendant, who was not a lawyer but a police officer, was the leader of executions. According to the regulations it was not necessary for a representative of the court or the prosecution to be present at the executions. Thus, as had been implied by the Court's acquitting the defendant on Count 1 of the Indictment, it did not seem reasonable to expect him to have judged from the presence or absence of any such representative whether the execution orders were or were not legally in order. The procedure seemed to have been as follows: Fehlis, a lawyer by profession was, in his capacity as Chief of the Sipo, supposed to ascertain in each individual case that the legal basis for the execution order had been complied with, to confirm the sentence or recommend for a reprieve. He would then issue the execution order furnished with the necessary details. In these circumstances the defendant could not be imputed for having acted according to orders unless special circumstances should have given him cause to make further investigations. The minority found that such special circumstances had not been proved. Thus defendant could not, in their opinion, be found guilty of having committed the acts in violation of Article 239 of the Civil Criminal Code. Consequently, the minority voted for an acquittal on all Counts.

### 4. THE APPEAL TO THE SUPREME COURT

The defendant appealed against the sentence of the Lagmannsrett on the following grounds:

(i) that the reasons given by the Lagmannsrett were insufficient and inconsistent with the conclusions reached by the Court;

(ii) that the Lagmannsrett had wrongly interpreted Article 1 of the Provisional Decree of 4th May, 1945, in so far as the assumption of the Court had been that an occupying power could not legally execute citizens of the occupied state except according to a sentence passed by a tribunal. The defendant contended that international law demanded only an investigation and a decision by an authority—not necessarily a court—vested with corresponding powers, before an execution could take place ;

(iii) that, whatever the circumstances, the punishment decided on by the Lagmannsrett was too severe.

## 5. THE JUDGMENT OF THE SUPREME COURT, 23RD AUGUST, 1947

The Supreme Court quashed the verdict and sentence of the Lagmannsrett.

Judge Holmboe, who was the first judge to give his reasons for the decision of the Supreme Court, held that in his opinion point 1 of the defendant's appeal was justified. Apart from the question whether criminal law had been rightly applied, the issue at hand was whether the defendant had been aware that the persons referred to in Counts 3-5 of the Indictment had not been tried and sentenced according to law. The Lagmannsrett had dealt with that question elaborately and had pointed out a number of circumstances which were supposed to indicate that the defendant had been cognisant of the situation. In Judge Holmboe's opinion, however, the reasons given by the Lagmannsrett in that connection were rather obscure and contradictory on several points. Thus the Lagmannsrett had apparently based their conclusion as to the defendant's guilt solely on the fact that no state of emergency had been officially declared, in assuming that he had had reason to suspect that some of the victims had not been tried by a Standesgericht. At the same time the Lagmannsrett had not contested the legality of the executions carried out in the winter of 1945, though a state of emergency had not been expressly declared. Judge Holmboe declared that neither according to international law nor according to German law, was the official declaration of a state of emergency a condition for the setting up of a Standesgericht. The Lagmannsrett seemed to have held the same opinion when declaring that the German Decree of 31st July, 1941, presupposed that *normally* a state of emergency had to be declared before a *civilian* Standesgericht could be set up.

The Lagmannsrett had further pointed out that in some instances it had been stated in the execution orders that sentence had been passed by the S.S. und Polizeigericht Nord whereas in other instances the name of the court had been omitted, and had maintained that in cases where the name of the court had *not* been mentioned, the defendant ought to have had his doubts as to the legality of the executions. Judge Holmboe maintained that those arguments were hardly consistent with what the Lagmannsrett had established in another connection, namely when ascertaining that the execution orders only mentioned the name of the court when the sentence

had been passed by the SS und Polizeigericht Nord, never when it had been passed by the Standesgericht. It had, however, been established that in every instance the execution orders had mentioned that the person to be executed had been " sentenced " to death.

As another indication of the defendant's *mala fides*, the Lagmannsrett had stated that the general regulations issued to him in his capacity as chief of the Sonderkommando had not been adhered to by his immediate superior Fehlis. Judge Holmboe assumed that that allegation referred to the provision that the sentence should be made known to those sentenced. That, however, was inconsistent with what had been established by the Lagmannsrett, namely that the execution orders given to the defendant had stated among other things that the person had been " sentenced " for a certain crime. Thus the general instructions had not been violated by Fehlis in any such way as to have given rise to suspicion on the defendant's part.

Judge Holmboe then drew the Court's attention to the paragraph in the Lagmannsrett's notes where the Court had stressed that the defendant had at no time done anything to obtain information in order to asertain whether the executions were legal or not. That statement taken in connection with what had been stated above, had given rise to doubts in Judge Holmboe's mind as to whether the Lagmannsrett had been aware of the fact that it was not sufficient for a conviction for wilful murder that the accused *ought to have known* the circumstances which made his act illegal. The Lagmannsrett had finished the statement of their reasons on that point by saying that the defendant must have been aware of the situation when he received the execution orders invoked in Counts 3-5 of the Indictment, an argument which, taken separately, would have been sufficiently lucid. As long as this seemed to have been the conclusions arrived at by the Lagmannsrett from the various arguments dealt with above, however, Judge Holmboe held that it could not explain away the prevailing ambiguity of the reasons as a whole, which ambiguity, in his opinion, was in itself sufficient to lead to the quashing of the sentence.

As to the defendant's plea of a wrong application of the criminal law, Judge Holmboe quoted a statement made by the Lagmannsrett referring to the indisputable and basic rules of international law which laid down that an occupation power had no right to undertake the execution of citizens of the occupied country except according to sentence by an appropriate court. In Judge Holmboe's opinion that was not an accurate interpretation of the provision of international law, which only seemed to demand that no execution should take place before proper and fair investigation of the case and a decision passed by an authority legally vested with appropriate powers. As Judge Holmboe had come to the conclusion that it was sufficient to quash the sentence of the Lagmannsrett on the grounds mentioned above, however, he did not find it necessary to go deeper into the second plea. In connection with the interpretation of the provision of international law referred to above and its applicability to the case in hand he restricted himself to pointing out that it would be necessary to take into consideration the

demands made by international law as to the procedure preceding a decision for execution, e.g., what authorities could be vested with the power to take the decision and what rules of procedure had to be adhered to.

Judge Bonnevie agreed with what had been said by Judge Holmboe, adding that the reasons given by the Lagmannsrett did not state sufficiently clearly whether the defendant had been aware of the illegality of his acts, a fact which the Court had taken for granted. Thus, for instance, it had not been mentioned whether or not the defendant had been aware that executing superior orders was not in itself unconditionally exculpatory. The reasons given by the Lagmannsrett did not clarify whether the defendant had acted under a misconception of law in performing his duties, a fact which in itself, according to Judge Bonnevie, must necessarily lead to the quashing of the sentence.

Judge Schjelderup added that the procedure put into force by Hitler's decree of June/July, 1944, and referred to by the Lagmannsrett, was not consistent with the minimum demands laid down by international law as a condition for executions. He made reference to what had been said in Holland's " The Laws of War on Land " (1908), p. 15 ff., and in Wheaton's " International Law II " (1944), p. 240.

Judges Alten, Bahr, Fougner, Berger, Skau and Stang concurred.

## B. NOTES ON THE CASE

According to Norwegian law on criminal procedure, the effect of the Supreme Court's decision to quash the sentence of the Lagmannsrett is that the case is open for retrial by the Lagmannsrett if the Director of Public Prosecutions is of the opinion that sufficient or additional proof of the defendant's guilt can be provided. If the Director of Public Prosecutions decides that such additional proof cannot be submitted and drops the case, the effect of the decision taken by the Supreme Court and the Attorney-General is that the defendant be released.(1)

As to the case in hand, the Director of Public Prosecutions announced on 1st November, 1947, that it was considered impossible to provide such additional proof as could lead to a retrial. As a consequence the defendant Hans was released.

It will be noted that, in the opinion of the Supreme Court, the defendant could not be held guilty unless it had been shown that he was actually aware that the victims had not been tried and sentenced according to law ; constructive knowledge was not sufficient.(2)

(1) See Vol. III of this series, pp. 90-1.
(2) See pp. 81, 90 and 91.

The question of superior orders entered into the present trial, but it would appear that such orders were regarded as relevant only in so far as they created or helped to create a mistake of fact in the accused's mind ; the duress aspect of superior orders was not considered by the Supreme Court.

## ANNEX

# AUSTRALIAN LAW CONCERNING TRIALS OF WAR CRIMINALS BY MILITARY COURTS

### I. THE LEGAL BASIS OF AUSTRALIAN MILITARY COURTS

The jurisdiction of the Australian Military Courts for the trial of war criminals is based upon the Commonwealth of Australia War Crimes Act, 1945, which came into operation on receiving the Royal Assent on 11th October of that year.

In its substance the Act bears a resemblance to the United Kingdom Royal Warrant of 14th June, 1945 (with amendments).(1) An important formal difference consists, of course, in the fact that while the United Kingdom provisions were made by a Royal Warrant issued under the Royal Prerogative, the corresponding Australian provisions were made by Act of Parliament.

Section 14 empowers the Governor-General to " make regulations or rules prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act." In accordance with this provision, the Regulations under the War Crimes Act, 1945 (Statutory Rules, 1945, No. 164, and 1946, No. 30) were promulgated on October 25th, 1945, and 20th February, 1946, the second document constituting an addendum to the first.

### II. DEFINITION OF " WAR CRIME " IN THE AUSTRALIAN ACT

Section 3 of the Act provides, *inter alia*, that, in the Act, " unless the contrary intention appears, . . .

' war crime ' means—

(*a*) a violation of the laws and usages of war ; or

(*b*) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September, One thousand nine hundred and forty-five, under the National Security (Inquiries) Regulations (being Statutory Rules, 1941, No. 35, as amended by Statutory Rules, 1941, Nos. 74 and 114, and Statutory Rules, 1942, No. 273).

committed in any place whatsoever, whether within or beyond Australia, during any war."(2)

The instrument of appointment referred to provided for the setting up of a Board of Inquiry to investigate war crimes committed by enemy subjects and, on the matter of definition, states that, for the purposes of the enquiry envisaged " the expression ' war crime ' includes the following :

(1) Regarding the Royal Warrant, see Vol. I of this series, pp. 105-110.

(2) At another point, Section 3 provides that " unless the contrary intention appears ' any war ' means any war in which His Majesty has been engaged since the second day of September, One thousand nine hundred and thirty-nine."

(i) Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(ii) Murder and massacres—systematic terrorism.

(iii) Putting hostages to death.

(iv) Torture of civilians.

(v) Deliberate starvation of civilians.

(vi) Rape.

(vii) Abduction of girls and women for the purpose of enforced prostitution.

(viii) Deportation of civilians.

(ix) Interment of civilians under inhuman conditions.

(x) Forced labour of civilians in connection with the military operations of the enemy.

(xi) Usurpation of sovereignty during military occupation.

(xii) Compulsory enlistment of soldiers among the inhabitants of occupied territory.

(xiii) Attempts to denationalize the inhabitants of occupied territory.

(xiv) Pillage and wholesale looting.

(xv) Confiscation of property.

(xvi) Exaction of illegitimate or of exorbitant contributions and requisitions.

(xvii) Debasement of the currency and issue of spurious currency.

(xviii) Imposition of collective penalties.

(xix) Wanton devastation and destruction of property.

(xx) Deliberate bombardment of undefended places.

(xxi) Wanton destruction of religious, charitable, educational and historic buildings and monuments.

(xxii) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew.

(xxiii) Destruction of fishing boats and of relief ships.

(xxiv) Deliberate bombardment of hospitals.

(xxv) Attack and destruction of hospital ships.

(xxvi) Breach of other rules relating to the Red Cross.

(xxvii) Use of deleterious and asphyxiating gases.

(xxviii) Use of explosive or expanding bullets and other inhuman appliances.

(xxix) Directions to give no quarter.

(xxx) Ill-treatment of wounded and prisoners of war, including—

(*a*) transportation of prisoners of war under improper conditions ;

(*b*) public exhibition or ridicule of prisoners of war ; and

(*c*) failure to provide prisoners of war or internees with proper medical care, food or quarters.

(xxxi) Employment of prisoners of war on unauthorized work.

(xxxii) Misuse of flags of truce.

(xxxiii) Poisoning of wells.

(xxxiv) Cannibalism.

(xxxv) Mutilation of the dead.''

The definition of the term '' War Crime '' contained in the Australian Act differs from that contained in the Royal Warrant. While under the Royal Warrant '' war crime '' means a violation of the laws and usages of war, the term as defined in the Australian Act is wider. In addition to violations of the laws and usages of war, in Australian law the term comprises also all the crimes enumerated in the Instrument of Appointment of 3rd September, 1945, and it will be seen that the definition contained in the Instrument of Appointment enumerates in the first place '' crimes against peace'', in the same words as those used in Article 6(*a*) of the Charter attached to the Four-Power Agreement of 8th August, 1945. The effect of this is that '' crimes against peace '' form part of the term '' war crime '' as defined by the Australian statute.

The Australian Act does not, on the other hand, comprise in its definition of '' war crime '' crimes against humanity within the meaning of Article 6(*c*) of the Charter of the International Military Tribunal, excepting such '' crimes against humanity '' as also fall under the term '' violations of the laws and customs of war.''

The two groups of war crimes comprised in the Australian definition overlap, because all the crimes enumerated in the Instrument of Appointment under (ii) to (xxxv) are violations of the laws and usages of war and fall therefore under both (*a*) and (*b*) of the Australian definition.

The catalogue of war crimes enumerated in the Australian list under (ii) to (xxxiii) is based on the list of war crimes drawn up by the Responsibilities Commission of the Paris Peace Conference in 1919.

There are, however, certain differences between the Australian list and the 1919 Paris List.

In the item (xiv) of the Australian list, corresponding to item (xiii) of the 1919 list, to the original word " pillage," the words " and wholesale looting " have been added.

In item (xxx) of the Australian list, which deals with the ill-treatment of wounded and prisoners of war and corresponds to item (xxix) of the Paris list, there are added the following illustrations :

" including :

(*a*) transportation of prisoners of war under improper conditions ;

(*b*) public exhibition or ridicule of prisoners of war ; and

(*c*) failure to provide prisoners of war or internees with proper medical care, food or quarters."

The Australian list contains, under (xxxiv) and (xxxv), the new items : Cannibalism and Mutilation of the Dead.

III. OTHER JURISDICTIONAL PROVISIONS CONTAINED IN THE ACT

The Preamble to the Act having stated the expediency of making provision for the trial and punishment of violations of the laws and usages of war committed against " any persons who were at any time resident in Australia or against certain other persons," Section 7 of the Act provides that :

> " A military court shall have power to try persons charged with war crimes committed, at any place whatsoever, whether within or beyond Australia, against any person who was at any time resident in Australia, and for that purpose, subject to any direction by the Governor-General, to sit at any place whatsoever, whether within or beyond Australia."

Article 12, however, adds the following :

> " The provisions of this Act shall apply in relation to war crimes committed, in any place whatsoever, whether within or beyond Australia, against British subjects or citizens of any Power allied or associated

with His Majesty in any war, in like manner as they apply in relation to war crimes committed against persons who were at any time resident in Australia."

Under the Act the Australian Military Courts have, therefore, jurisdiction in all cases where the victim has been either resident in Australia or a British or an allied subject.

The jurisdiction of the Australian Military Courts does not extend to crimes committed " against any civilian population," e.g., against neutrals or enemy subjects, because crimes against other than British and allied nationals are outside the scope of the term " war crime " as defined in the Australian Statute.

## IV. THE CONVENING OF A MILITARY COURT

Section 5 (1) of the Act empowers the Governor-General, *inter alia*, to " (*a*) convene military courts for the trial of persons charged with the commission of war crimes ", and " (*b*) appoint officers to constitute military courts".

Section 6 empowers the Governor-General to delegate any powers provided to him by Article 5 of the Act.

## V. COMPOSITION OF A MILITARY COURT

Regulation 8 of the Regulations made under the Act contains a provision which is identical with the first paragraph of Regulation 5 of the United Kingdom Royal Warrant:

> " A Military Court shall consist of not less than two officers in addition to the President, all of whom shall be appointed by name, but no officer, whether sitting as President or as a member, need have held his commission for any special length of time. If the accused is an officer of the naval, military or air force of an enemy or ex-enemy Power the Convening Officer should, so far as practicable, but shall be under no obligation so to do, appoint as many officers as possible of equal or superior relative rank to the accused. If the accused belongs to the naval or air force of an enemy or ex-enemy Power the Convening Officer should appoint, if available, at least one naval officer or one air force officer as a member of the Court, as the case may be."

From Section 5 (4) and (5) of the Act it appears that the Australian legislature had adopted the institution of mixed Military Courts on the same lines as are provided for in the third paragraph of Regulation 5 of the Royal Warrant. The appointing authority is enabled to appoint as a member (other than the President) of the court one or more officers of the naval, military or air forces of any allied or associated Power. The number

of officers appointed in this way shall not comprise more than half the members of the court, excluding the President. Under Regulation 8A of the Regulations for the trial of War Criminals, as inserted by Statutory Rule 1946, No. 30, officers of the naval, military or air forces of the United Kingdom or of any other part of His Majesty's Dominions, may be appointed members of the military court other than President.

In the same way as Regulation 6 of the Royal Warrant, the Australian Regulation 9 provides that an accused shall not be entitled to object to the President or any member of the Court or the Judge Advocate or to offer any plea in bar or any special plea to the jurisdiction of the Court.

## VI. APPOINTMENT OF JUDGE ADVOCATE

Regulation 5 states that the authority by whom a military court is convened or any authority by whom the Court could have been convened may appoint a Judge Advocate to the Court.

The duties of the Judge Advocate are set out in Rule 103 of the Rules of Procedure made under Article 70 of the Army Act ; [1] they consist mainly in advising the Court on matters of substantive and procedural law. He must also, unless both he and the Court think it unnecessary, sum up the evidence before the Court deliberates on its findings. Paragraph (*h*) of Rule 103 lays down that, " In fulfilling his duties the Judge Advocate will be careful to maintain an entirely impartial position." The Judge Advocate has no voting powers. The members of the Court are judges of law and fact, and consequently the Judge Advocate's advice need not be accepted by them, though in practice it carries great weight.

## VII. RULES OF EVIDENCE AND PROCEDURE

Section 10 of the Australian Act makes a provision which is substantially the same as that made by the first paragraph of Regulation 3 of the Royal Warrant :

> " Except so far as is inconsistent with this Act, and subject to such exceptions, modifications, adaptations and additions as are prescribed by or under the *Defence Act*, 1903-1945, or this Act, the provisions of the Imperial Act known as the Army Act and any Imperial Acts amending or in substitution for it and for the time being in force and the Rules of Procedure made thereunder, in so far as they relate to field general courts-martial and to any matters preliminary or incidental thereto or consequential thereon, shall, so far as applicable, apply to and in relation to military courts and any matters preliminary or incidental thereto or consequential thereon, in like manner as if military

[1] See Section 10 of the Australian War Crimes Act, which is quoted under the next heading.

courts were field general courts-martial and the accused were persons subject to military law charged with having committed offences on active service."

Like the second paragraph of Regulation 3 of the Royal Warrant, the Australian Regulation 4 enumerates certain provisions of the Army Act and the Rules of Procedure made under it which are not to apply to war crime trials. Furthermore, Article 9 (1) of the Act provides that: " At any hearing before a military court the court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that the statement or document would not be admissible in evidence before a field general court-martial."

Australian Regulation 12 makes the following provision, which is in the same terms as the United Kingdom Regulation 8 (ii) as amended:

" Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime.

" In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court."

## VIII. REPRESENTATION BY COUNSEL

Regulation 10 provides that Counsel may appear on behalf of the prosecutor and accused in like manner as if the military court were a General Court-Martial. The Regulation adds, however, that in addition to the persons deemed to be properly qualified to act as Counsel before a General Court-Martial, any person qualified to appear before the courts of the country of the accused and any person approved by the Convening Officer shall be deemed to be properly qualified as Counsel for the Defence.

## IX. PUNISHMENT OF WAR CRIMES

Under Section 11 (1) of the Australian War Crime Act, a person found guilty by a military court of a war crime may be sentenced to and shall be liable to suffer death (either by hanging or by shooting) or imprisonment for life, or for any less term; and, in addition or in substitution therefor, either confiscation of property or a fine of any amount, or both.

The Court may also order the restitution of any money or property taken, distributed or destroyed by the accused, and award an equivalent

penalty in default of complete restitution (Regulation 11 (2) ). It is also provided, in Regulation 11 (3), that sentence of death shall not be passed on any person by a military court without the concurrence of all those serving on the court if the court consists of not more than three members, or without the concurrence of at least two-thirds of those serving on the court if the court consists of more than three members.

## X. CONFIRMATION OF SENTENCES

No right of appeal in the ordinary sense of that word exists against the decision of an Australian Military Court. The accused may, however, within 48 hours give notice of his intention to submit a petition to the Confirming Officer against the finding or the sentence or both. The petition must be submitted within 14 days. If it is against the finding it shall be referred by the Confirming Officer to the Australian Judge Advocate-General or to his deputy. The finding and any sentence which the Court had jurisdiction to pass, if confirmed, are valid, notwithstanding any deviation from the Regulations or the Rules of Procedure or any technical or other defect or objection. An exception exists only in the case where it appears that a substantial miscarriage of justice has actually occurred. These provisions are made by Regulations 17 and 18 ; Regulation 19, however, adds that : " When a sentence passed by a Military Court has been confirmed the Governor-General or the Military Board or any officer not below the rank of Major-General who for the time being would have power to confirm the sentence of a Military Court if it had not been confirmed, shall have power to mitigate or remit the punishment thereby awarded or to commute such punishment for any less punishment or punishments to which the offender might have been sentenced by the said Court : Provided that this power shall not be exercised by an officer holding a command or rank inferior to that of the officer who confirmed the sentence."

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